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Court of Exchequer.

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161	21	"contrived"	..	"construed"
167	32	"Lowndes'"	..	"Lowe's"
168	note (1)	"9 Eq.,"	..	"10 Eq."
178	17	"broker"	..	"brother"
180	30	"settled for up to that time;"	..	"settled; for up to that time"
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CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXIV VICTORIA.

ROBINSON *v.* BRIGGS.

1870
Nov. 3.

Bill of Sale—Apparent Possession—17 & 18 *Vict. c.* 36, *ss.* 1, 7—*Occupation.*

9 QB 256
1 Ex D. 288
14 QBD 578

The 17 & 18 Vict. c. 36, s. 7, enacts that personal chattels shall be deemed to be in the "apparent possession" of the grantor of a bill of sale, so long as they shall remain or be in or upon any house, land, or other premises "occupied" by him:—

Held, that the "occupation" referred to in this section is actual *de facto* occupation.

The grantor of a bill of sale, which was not registered, was tenant of rooms where the goods comprised in it were placed, but he resided elsewhere. Having made default in paying the sum secured he gave the keys of the rooms to the grantee, who opened the rooms and put his own name on some of the goods. None, however, were removed, and an execution at the suit of a judgment creditor against the grantor was afterwards levied on them:—

Held, that the grantor did not "occupy" the rooms within the meaning of 17 & 18 Vict. c. 36, s. 7, and that the goods were not to be deemed in his "apparent possession," and that the bill of sale was therefore valid as against the execution creditor.

Declaration for trespass to goods. Plea (among others): not possessed. Issue thereon.

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ROBINSON v. BRIGGS.

The plaintiff was the grantee of a bill of sale dated the 8th of July, 1868, of some household furniture then at No. 5, Nelson Street, Sunderland. The bill of sale was given to him by Robert Coundon, a seafaring man, to secure an advance of 250*l.* The defendant was the sheriff of the county of Durham, and on the 10th of May, 1870, seized the goods comprised in the bill of sale under a writ of fi. fa. sued out by a judgment creditor of Coundon.

The bill of sale was not registered, and Coundon remained in possession of the goods until he went to sea in the autumn of the year 1868, when the house in Nelson Street was given up, and Coundon's wife, acting for him, took two rooms at No. 12, Ward Street, Sunderland, to be ready for her husband's return, and to these two rooms she removed the household furniture in question. She remained in the rooms for two or three nights, but afterwards went to live elsewhere with her daughter-in-law, only going to Ward Street occasionally in the daytime to fetch any article she might happen to require. When her husband returned in the spring of 1870 he joined his wife at the daughter-in-law's house. On the 9th of May, 1870, the plaintiff, pursuant to the terms of the bill of sale, demanded payment of the £250 secured by the bill within twelve hours, and default being made, Coundon directed his wife to take the keys of the rooms in Ward Street to the plaintiff and give them up to him, in order that he might take possession of the furniture. She did so, and the plaintiff went to Ward Street with the keys, opened the rooms, and put his name on some of the goods which, however, he did not remove. On leaving, he locked the door. Next day the execution on the part of the judgment creditor was levied by the defendant. Neither Coundon nor his wife were at the rooms between the time when the keys were delivered to the plaintiff and the levy.

The cause was tried before Cleasby, B., at the Durham Summer Assizes, 1870. The learned judge left it to the jury to say whether No. 12, Ward Street, was at the time of the execution being put in by the sheriff in the occupation of Coundon or not. The jury found that it was not, and a verdict was thereupon entered for the plaintiff.

Manisty, Q.C., for the defendant, moved for a new trial on the

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v.
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ground of misdirection, and that the verdict was against the evidence. At the time of the execution the goods comprised in the bill of sale were in the "apparent possession" of Coundon, the grantor, within the meaning of 17 & 18 Vict. c. 36, s. 1, and therefore the bill of sale not being registered was invalid as against an execution creditor. Sect. 7 of 17 & 18 Vict. c. 36, enacts that personal chattels shall be deemed to be in the "apparent possession" of the maker of a bill of sale "so long as they shall remain or be in any house . . . *occupied* by him or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." Now here Coundon was the "occupier" of the Ward Street rooms, though he did not reside there. He was tenant of the rooms, and they were used for a purpose designated by him. His wife had the sole control over the keys and went to and fro when she pleased. The mere handing over of the keys to the plaintiff certainly did not terminate Coundon's tenancy or change the occupation.

THE COURT (Kelly, C.B., Bramwell, Pigott, and Cleasby, BB.) refused the rule. Coundon remained tenant of the Ward Street rooms, but he had ceased to be in actual occupation, and the mere continuance of his tenancy was not sufficient. The occupation pointed at in 17 & 18 Vict. c. 36, s. 7, must be an actual de facto occupation. There was nothing of that sort here, and the plaintiff had done all he was called upon to do to reduce the goods into his own possession. He, if anyone, was the actual occupier of the premises.

Rule refused.

Attorney for defendant: *Dixon, for Watson of Durham.*

1870
Nov. 8.

MILBURN AND OTHERS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Practice—Staying Proceedings—Order of Court of Admiralty—Superior Court of Law or Equity—Injunction—C. L. P. Act, 1852, *s.* 226.

The 17 & 18 Vict. c. 104, s. 514, enables the Court of Chancery, in cases where any liability has been, or is alleged to have been, incurred by the owner of a ship in respect of (inter alia) damage to, or loss of goods, and several claims are made or apprehended with regard to such liability, to entertain proceedings at the owner's suit to determine and distribute among the various claimants the amount of such liability *with power to stop all actions or suits* in relation to the same subject matter. The 24 Vict. c. 10, s. 13, confers a similar power on the Court of Admiralty. That Court acting under the last-mentioned statute, made an order in certain Admiralty proceedings, at the instance of the defendants, stopping the present action, which was brought against them to recover damages for loss of the plaintiffs' goods in consequence of the sinking of a ship belonging to the defendants. The defendants thereupon applied to this Court for a rule to stay, but the Court declined to interfere, being of opinion that the Common Law Procedure Act, 1852, s. 226, was not applicable to any case except where an order stopping an action or suit had been issued by a "superior court of law or equity," and seeing no reason to exercise their discretionary power at common law of staying proceedings.

THE plaintiffs brought this action to recover the value of two cases of goods delivered by the plaintiffs to the defendants in London on the 15th of March, 1870, to be carried by them from London to Guernsey viâ Southampton. The goods were safely conveyed to Southampton, where they were on the 16th of March placed on board the steamship *Normandy*, then bound for Guernsey, whereof the defendants were owners. Whilst on her voyage, the *Normandy* came into collision with a ship called the *Mary*, and, in consequence, sank with the whole of her cargo. In May, 1870, cross causes of damage were instituted in the Admiralty Court against the *Mary* and *Normandy* for the recovery of the damages which the owner of each ship alleged he had received through the negligence of the captain of the other. Whilst these suits were pending, the defendants instituted proceedings in the Court of Admiralty for the limitation of their liability, according to the provisions of the Merchant Shipping Amendment Act, 1862 (24 & 25 Vict. c. 63), s. 54, and actions, of which the present was one, having been brought, and others threatened against them for the recovery of damages for the loss of the life of persons as well as for the loss of goods, they applied to the Court of Admiralty for an order to stop all such actions under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 514, and the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 13. (1) An order was thereupon made in the following terms:—"The judge having heard counsel for the plaintiffs [the now defendants] and the several defendants [amongst whom were the now plaintiffs], orders that all actions and suits pending in any other court in relation to the subject matter of this suit, to wit, the liability of the owners of the vessel *Normandy*, the plaintiffs in this suit, in respect of loss of life or personal injury or loss or damage to ships, goods, merchandize, or other things, on the occasion of a collision which occurred on or about the 17th of March, 1870, between the *Normandy* and a vessel called the *Mary*, be stopped, the plaintiffs, by their counsel, undertaking to admit their liability in all such actions or suits as soon as this Court shall have pronounced for the damage proceeded for in the cause pending in this court, entitled the *Normandy*, or for a moiety of such damage." A copy of this order was served on the plaintiffs.

Butt, Q.C. (*C. W. Wood* with him), moved for a rule calling on

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(1) The 17 & 18 Vict. c. 104, part 9, s. 514, enacts, that "in cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then . . . it shall be lawful, in England or Ireland, for the High Court of Chancery . . . to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, . . . and for the distribution of such amount rateably among the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject matter; and any proceeding entertained by such Court of Chancery . . . may be conducted in such manner, and subject to such regulations, as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

The 24 Vict. c. 10, s. 13, enacts, that, "whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said Court shall have the same powers as are conferred upon the High Court of Chancery in England by the 9th part of the Merchant Shipping Act, 1854."

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the plaintiffs to shew cause why all proceedings in the action should not be stayed in accordance with the order of the Admiralty Court. This order is not one of a "superior court of law or equity," when the Common Law Procedure Act, 1852, s. 226 (1), would apply in terms, and this Court would be compelled, on application, to stay all proceedings. But, although the order is one of the Admiralty Court only, and not of a superior court, still this Court, having regard to the fact that it was made by the Admiralty Court exercising the powers of the Court of Chancery, under 24 Vict. c. 10, s. 13, will, in the exercise of its discretion, and acting in analogy to the course they would be obliged to adopt had the Common Law Procedure Act, 1852, s. 226, applied in terms, stay proceedings.

[BRAMWELL, B. You ask us to exercise the power to stay, which we are possessed of at common law. Is there any precedent for its exercise under such circumstances as those of this case?]

No; but the Common Law Procedure Act, 1852, s. 226, having enacted that the Court *shall* stay, where the Court of Chancery has issued an injunction, it is not unreasonable to ask the Court, in the exercise of its discretion, to stay, where the Court of Admiralty, which *pro hac vice* is, under 24 Vict. c. 10, s. 13, equivalent to the Court of Chancery, has issued an injunction.

KELLY, C.B. This rule must be refused. The Common Law Procedure Act, 1852, s. 226, does not apply to this case, and, apart from that statute, the Court see no valid reason for staying proceedings.

BRAMWELL, PIGOTT, and CLEASBY, BB., concurred.

Rule refused.

Attorney for defendants: *L. Crombie.*

(1) By the Common Law Procedure Act, 1852, s. 226, it is enacted, that "in case any action, suit, or proceeding in any court of law or equity shall be commenced, sued, or prosecuted, in disobedience of, or contrary to, any writ of injunction, rule, or order of either of the superior courts of law or equity at Westminster, . . . in any other court than that by or in which such injunction may have been issued, or rule or order made, . . . the said other court shall stay all further proceedings contrary to any such injunction, rule, or order."

HENKEL AND ANOTHER *v.* PAPE.

1870
Nov. 10.

Contract—Principal and Agent—Telegraph Clerk—Mistake in Telegram.

The defendant wrote a message for transmission by telegraph to the plaintiffs, ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three;" and the plaintiffs thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. The defendant declined to take more than three. In an action against him to recover the price of the fifty rifles:—

Held, that the defendant was not responsible for the mistake of the telegraph clerk, and that therefore the plaintiffs were not entitled to recover the price of more than three rifles.

DECLARATION for goods bargained and sold, and for goods sold and delivered.

Pleas, first, except as to 7*l.* never indebted; and, secondly, as to 7*l.* payment into Court. The plaintiffs accepted the money paid into Court, and joined issue on the first plea.

The plaintiffs are gun manufacturers in London and Birmingham, and the defendant is a gun-maker at Newcastle-upon-Tyne. On the 4th of June, 1870, the plaintiffs received from the defendant the following letter:—"Send sample Snider, with sword-bayonet, forward immediately. I can fix an order for fifty, I think, and it may lead to many large orders. Can you do them at 34*s.* nett cash on delivery, so as to secure the order? I shall have to cut very fine, and several will be in for it." In reply the plaintiffs wrote: "We have forwarded you this day sample Snider, with sword-bayonet. We cannot possibly do them for less than 35*s.* nett cash." With this letter the sample was sent. On the 7th of June the plaintiffs received the following telegram purporting to come from the defendant: "Send by mail immediately *the* Snider rifles same as pattern. Must be here in the morning. Ship sails then." The plaintiffs on receipt of this communication sent fifty rifles to the defendant. On the 9th of June they received the following letter from him: "I am surprised that you sent fifty instead of three rifles. The telegram was to send *three*." In fact, the clerk who sent the telegraphic message had by mistake telegraphed the word "the" instead of "three." The defendant had written "three," and not "the," on the message paper. Under these cir-

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cumstances the plaintiffs insisted on the defendant accepting the fifty rifles sent, but the defendant declined to take more than three. This action was then brought. The defendant paid a sum into court sufficient to cover the price of three rifles and their carriage. He denied his liability as to the residue of the plaintiffs' claim, contending that he could not be made responsible for the mistake of the telegraph clerk.

The cause was tried before Blackburn, J., at the Surrey Summer Assizes, 1870, when a verdict was directed for the defendant, with leave to move to enter a verdict for the plaintiffs for the invoice price of the remaining forty-seven rifles.

H. Thompson Chitty moved accordingly :—The telegraph clerk was the defendant's agent to transmit the message, and the defendant is responsible for the mistake in the transmission. Chitty on Contracts, 6th ed. p. 197. There is no privity between the plaintiffs and the telegraph clerk, nor can they proceed against the Post-office, his employers: *Playford* v. *United Kingdom Telegraph Company.* (1) Their right remedy is against the defendant. Suppose in a letter written by himself he had made the mistake, he would clearly have been liable ; and in the transmission of each particular message the telegraph clerk is the agent of the sender. Upon the sender therefore must rest the responsibility of any error committed by the agent in the course of his employment.

KELLY, C.B. We are of opinion that in this case there should be no rule. The question is whether the defendant has entered into a contract to purchase fifty rifles, and there is no doubt he might have bound himself either by letter or a telegraphic message. But the Post-office authorities are only agents to transmit messages in the terms in which the senders deliver them. They have no authority to do more. Now in this case the evidence is that the defendant agreed to take three rifles, and three only, and he authorized the telegraph clerk to send a message to that and to no other effect. That being so, there was no contract between the plaintiffs and defendant for the purchase of fifty rifles. The defendant cannot be made responsible because the telegraph clerk made a mistake in the transmission of the message. There was no contract between the parties such as the plaintiffs rely on. The verdict therefore ought to stand.

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(1) Law Rep. 4 Q. B. 706.

BRAMWELL, PIGOTT, and CLEASBY, BB., concurred.

Rule refused.

Attorney for plaintiffs: *W. H. Smith.*

1870
Nov. 14.

66 B 550

CROSS AND OTHERS v. PAGLIANO.

Charterparty—Construction—Commissions "inwards and outwards"—Printed and Written Matter.

A charterparty made between the plaintiffs, the charterers, through the agency of G. & Co., and the defendant, the captain of the *Elvezia*, provided among other things that the ship should proceed with a cargo to San Francisco, "where the ship shall be consigned to charterers' agents inwards and outwards, paying the usual commissions . . . and deliver the same . . . and so end the voyage;" and that "on her return to her port of discharge in the United Kingdom" she should be reported at the Custom House by G. & Co.:—

Held, that these provisions did not impose on the defendant an obligation to accept a homeward cargo for the United Kingdom from the plaintiffs' agents at San Francisco, but merely bound him, if he had determined upon taking a return cargo on board there, to employ them to procure and ship it.

DECLARATION on a charterparty made between the plaintiffs and the defendant, whereby it was among other things agreed that for a certain agreed freight payable by the plaintiffs, the charterers, to the defendant, the master of the ship *Elvezia*, the ship should proceed with a cargo to San Francisco, and should be there and thence consigned to the agents of the plaintiffs, the defendant paying commission *inwards and outwards;* that all things were done, &c., yet the defendant broke the charterparty in not consigning the ship to the plaintiffs' agents, and in not paying commissions inwards and outwards.

Pleas: First, Non assumpsit. Secondly, Traverse of breaches. Thirdly, Exoneration. Issues thereon.

The charterparty declared upon, which was entered into on behalf of the plaintiffs by Messrs. Gow & Co., of Glasgow, contained the following, amongst other stipulations: 1. That the ship should proceed from Glasgow with a full cargo to San Francisco, "where the ship shall be consigned to the charterers' agents *inwards and outwards*, paying the usual commissions, or so near thereto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage;" and 2. That the ship should be reported by Messrs. Gow & Co. "at the custom-house on her return to her port of discharge in the United Kingdom." This second stipulation was in print at the end of the charterparty. It was inserted in all Messrs. Gow & Co.'s forms.

At the time of his entering into this charterparty the captain was in fact, but not to the plaintiffs' knowledge, bound under another of an earlier date to bring home a cargo of goods from Selina Cruz in Mexico to Hamburg; and after discharging the plaintiffs' cargo at San Francisco, to which port the ship had proceeded in accordance with the charterparty made with the plaintiffs, she sailed in ballast for Selina Cruz, where the homeward cargo was obtained. The plaintiffs' agents were not employed in obtaining this cargo; they had offered the captain a cargo for Europe at San Francisco, but he being already bound under his earlier contract, declined to accept it. They received a small amount of money for services rendered by them in connection with the ship sailing in ballast.

At the trial before Kelly, C.B., at the Guildhall sittings after Trinity Term, 1870, on proof of these facts, a verdict was entered for the plaintiffs, for an agreed amount of damages, calculated on what was proved to be the usual basis for estimating commissions, viz., 2½ per cent. for the voyage to the foreign port, and 5 per cent. for the return voyage, with leave to the defendant to move to enter a verdict for him.

A rule was afterwards obtained accordingly, on the ground that the defendant was not bound to accept cargo from the plaintiffs' agents at San Francisco, and that there was no breach of the contract by him, and that the commission claimed was not payable.

Nov. 14. *Henry James*, Q.C., and *Cohen*, shewed cause. The charterparty clearly contemplates that the ship shall make a return voyage with a cargo supplied by the plaintiffs' agents. The ship is consigned to them "inwards and outwards," and "commissions," not a commission only, are payable. The word, being in the plural, shews what the intention was. Again, the printed clause indicates that the parties intended the ship to return to the United Kingdom from San Francisco. Otherwise the stipulation that she is to be reported by Messrs. Gow & Co. has no meaning. The circumstance of the clause being in print does not deprive it of significance. Taking both clauses together, the ship, if not bound to return direct to her port of discharge in the United Kingdom, was at all events bound to take a cargo for some European port, whether in the United Kingdom or in any other reasonable place, from the plaintiffs' agents. The terms of the charterparty would not be satisfied by a mere coast voyage of a few miles, for example.

Sir *G. Honyman*, Q.C. (*R. G. Williams* and *Herschell* with him), in support of the rule. According to the plaintiffs' construction, this charterparty imports an absolute engagement by the captain that he will return from San Francisco with a homeward cargo, to be provided by the plaintiffs' agents. But the true meaning of the first clause is, that the plaintiffs' agents are to receive the usual commission inwards, and outwards also if they, in fact, provide a cargo, or perform any services with reference to the ship's return voyage from San Francisco, but not otherwise. If any shipbroker's work was done there, the plaintiffs' agents were to do it on the ordinary terms, but they were not to have a right to insist upon such work being done. As to the word "commissions" being in the plural, it is quite consistent with the defendant's contention; and, indeed, in this case, commissions were actually earned. With regard to the printed clause it ought not to be construed to bind the defendant to return. A sensible meaning may be given it by holding that it applies to the case of the ship returning in fact, but at the defendant's option, to the United Kingdom. [He was stopped.]

Kelly, C.B. The question in this case depends on the construction to be placed on two clauses of the charterparty between the plaintiffs and the defendant. The first of these provides that the ship shall proceed with a cargo from Glasgow to San Francisco, where she "shall be consigned to the charterers' agents inwards and outwards, paying the usual commissions, or so near thereto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage." Now, it is noticeable that the word "voyage" is in the singular number, and but for the occurrence of the word "outwards" there could be no sort of doubt as to the meaning of the clause. The charterparty would then clearly contemplate a single voyage to San Francisco, where, after the cargo was discharged, the contract between the parties would come to an end. But the plaintiffs insist that something more was contracted for, the ship being consigned to their agents inwards and *outwards*, paying the usual commissions, and that the defendant was bound to accept an outward cargo to the United Kingdom from those agents, and pay commission on it. I am of opinion, however, that inasmuch as clearly no voyage from San Francisco would have been stipulated for without these words, it cannot be that their being added creates an absolute engagement by the defendant such as the plaintiffs contend for. I think the words merely mean that *if*, on arrival at San Francisco, the defendant takes another cargo on board for any port, whether in the United Kingdom or elsewhere, the plaintiffs' agents shall be employed to get and ship it, and shall be entitled to commission for their services as ship's brokers. The words do not appear to me to create a new and extensive liability, namely, that the defendant should be bound to take a cargo at San Francisco so as to entitle the plaintiffs' agents to commission.

Then it is said that, independently of this part of the charterparty, the words at the close of it clearly shew that it was the intention of the parties that a return cargo should be placed on board at San Francisco for some port in the United Kingdom. The clause provides that the ship "shall be reported at the custom house on her return to her port of discharge in the United Kingdom" by the plaintiffs' agents, Messrs. Gow & Co.; and it is contended that these words constitute an absolute contract that the ship *shall* return. But, in my judgment, they mean no more than that, *if* the ship do return, the Glasgow brokers shall be employed to report her, and shall be paid for any services incidental to that report. Under these circumstances, and taking this view of the contract between the parties, I think the commission sued for was not earned, the ship not having taken, in fact, a cargo on board at San Francisco. The rule, therefore, must be made absolute.

BRAMWELL, B. I am of the same opinion for the same reasons, but I desire to add a few words. First, with regard to the clause providing for the consignment of the ship outwards as well as inwards, paying the usual commissions. I take its meaning to be this: Whatever would have to be done by a ship's broker if a cargo had been taken on board outwards at San Francisco the plaintiffs' agents were to do; or if the ship should sail in ballast—as, in fact, she did—any services required in connection with her so sailing were to be performed by those agents. As to the argument that the word "commissions" in the plural must mean that commissions were to be payable both on the voyage to San Francisco and back, it seems to me very refined; but, adopting it, it does not serve the plaintiffs, for their own accounts shew that they have, in fact, received more than one commission.

If the case had rested entirely on this clause, I should have thought it too clear for argument. But then the printed words at the end of the charterparty are pressed on us. It is said that, either alone or together with the earlier clause, they shew that the ship was bound to come back to a port in the United Kingdom to discharge with a cargo taken on board at San Francisco. Such, at all events, was one of the contentions on behalf of the defendant. But it was also put rather more vaguely thus: it was said that the ship was bound to bring back a cargo either to a port in the United Kingdom or some "reasonable" port in Europe. This phrase, however, really has no meaning in connection with the present subject. The ship was an Italian ship, and Genoa was suggested as a reasonable port. But it could not be maintained that for this reason she would be limited either to Italian ports or the Mediterranean. In fact, under the earlier charterparty she was bound for Hamburg. There is, in fact, no rule by which we can determine what is or is not a "reasonable" port, and in connection with such a subject-matter the phrase is mere verbiage. The plaintiffs must contend that the ship was bound to come back to a port in the United Kingdom. But is it possible that the words of this clause can be so construed? It is a usual clause; it

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v.
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is in print; it is in all the charterparties entered into by Messrs. Gow, and I think we can give it a sensible meaning. It means, in my opinion, that *if* the ship comes back she is to be reported by the plaintiffs' agents, but it does not mean that she *shall* come back. To hold that the words are imperative would be, to my mind, irrational. They cannot bind the captain to get a cargo at San Francisco. I may add that, in my opinion, these printed clauses are very mischievous. If persons who enter into contracts would put down the terms in writing, there would be fewer mistakes as to what they really have contracted to do than there are now as to the effect of these printed clauses, which, very often, neither party takes the trouble to read.

PIGOTT, B. I am of the same opinion. I have not from the beginning of the argument entertained much doubt as to the meaning of this charterparty. We must construe the contract as a whole reasonably. And, first, with regard to the words "inwards and *outwards*, paying the usual commissions," I think it reasonable to hold that they mean that, so far as a ship's broker is employed at San Francisco, whether to clear out the ship in ballast or with cargo, the plaintiffs' agents are to do the work. We cannot imply from the words an absolute obligation on the captain to take a cargo from them. Then as to the printed words, I entirely agree with my Brother Bramwell. I think that the clause is intended to meet cases where a homeward cargo is found, in fact, at the foreign port, but is not intended to bind the captain of the ship to take such a cargo.

Rule absolute.

Attorney for plaintiffs: *E. Byrne.*
Attorneys for defendant: *Westall & Roberts.*

DEATH *v.* HARRISON.

1870
Nov. 16.

County Court—Interpleader Summons under 30 & 31 *Vict. c.* 142, *s.* 31—*High Bailiff of County Court—Stay of Action.*

5 Ex D 314-6
7 QBD 43

Where an interpleader summons has been issued under s. 31 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), the county court judge has power to adjudicate upon any special damages to which the claimant of the goods seized may be entitled arising out of the execution; and, whether such damages are claimed before him or not, no action in respect of them can be maintained by the claimant.

Declaration, trespass for breaking and entering the plaintiff's house, and seizing and converting his goods, laying as special damage that the plaintiff was thereby deprived of the use of his said goods in the way of his business as a lodging-house keeper, and was prevented from letting furnished lodgings for the season then ensuing, and was otherwise injured.

The fifth plea contained allegations shewing that a warrant had issued out of the Essex County Court at Harwich, for the satisfaction of a judgment recovered in the Essex County Court at Colchester by the defendant and one Benham against D. D., the plaintiff's son, by virtue of which warrant the bailiff entered the plaintiff's house (the door being open and goods of D. D. being therein), and seized the goods in question as and for the goods of D. D.; that on the same day the plaintiff claimed the goods and served notice of his claim on the bailiff, and that thereupon the registrar of the Harwich County Court issued interpleader summonses in the usual form, directed respectively to the defendant and Benham and to the plaintiff, and which were duly served; that before the day fixed for adjudication, the plaintiff not having deposited with the high bailiff either the value of the goods claimed, or the bailiff's costs of keeping possession till the summons was adjudicated upon, nor offered to do so, the bailiff sold the goods and paid the proceeds into Court (1); that the judge afterwards adjudicated on the claim, and declared that the plaintiff (the claimant) was entitled to goods sold to the amount of 23*l.* 14*s.*, subject to certain deductions for fees, and that the residue of the

(1) See 19 & 20 Vict. c. 108, s. 72.

goods sold were not proved to belong to the claimant, and ordered that no action or proceeding should be taken against the bailiff; that the sum to which the plaintiff was entitled under the order was duly paid to him, and that the order was not appealed from; the plea then alleged (after setting out rule 175 of the County Court Rules, 1868) that the plaintiff delivered particulars of his claim after the sale of the goods, and did not make any claim for damages arising or capable of arising out of the seizure or sale; and, finally, the plea alleged that all forms were observed and conditions complied with necessary to make the judge's order valid, that it was final and conclusive between plaintiff and defendant, and that the seizure and taking in the declaration was the aforesaid seizure by the high bailiff, and that the seizure and conversion by the plaintiff was the causing the writ of execution to be issued and the levy to be made, and that the defendant was not otherwise guilty of the trespass and grievances complained of. (1)

Demurrer and joinder. (2)

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(1) It was suggested by Martin, B., that the final allegation of the plea made it amount to an argumentative plea of not guilty; but this point was waived by Gray, Q.C.

(2) The 31st section of 30 & 31 Vict. c. 142, is as follows:—

"If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of a county court, or in respect of the proceeds or value thereof, *by any person*, it shall be lawful for the registrar of the Court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the said Court, as well the party issuing such process as the party making such claim; and the judge of the Court shall adjudicate upon such claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as to him shall seem fit, *and shall also adjudicate between such parties or either of them and the high bailiff in respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff*, and make such order in respect thereof and of the costs of the proceedings as to him shall seem fit; and such orders shall be enforced in like manner as any order in any suit brought in such Court, and shall be final and conclusive as between the parties, and as between them, or either of them, and the high bailiff, unless the decision of the Court shall be in either case appealed from, *and upon the issue of the summons any action which shall have been brought in any Court in respect of such* claim, or of any damage arising out of the execution of such process, shall be stayed."

Rule 175 of the County Court Rules of January, 1868, is as follows:—

"Where the claimant to goods taken in execution claims damages from the execution creditor, or from the high bailiff, for or in respect to the seizure of the goods, he shall in the particulars

Jelf, for the plaintiff. The 175th rule, made in pursuance of 30 & 31 Vict. c. 142, s. 31, only enables the claimant, if he thinks fit, to insert a claim for special damage in his particulars, but this is for his benefit, and it does not take away his right of action if he elects not to claim in that form. To construe it otherwise would be to treat it as taking away his right by implication merely.

Gray, Q.C. (*Hudson* with him), in support of the plea. After the issue of an interpleader summons under 30 & 31 Vict. c. 142, s. 31, no action can be brought by any of the parties to the summons in respect of any claim arising out of the execution, but the whole matter must be adjudicated upon by the county court judge. Under s. 118 of the old Act of 9 & 10 Vict. c. 95 (for which the present section has been substituted), it was held by the majority of this Court, in *Tinkler* v. *Hilder* (1), that after the issue of the interpleader summons no action could be brought in respect of any part of the execution. There, no particulars of claim having been delivered, there was in fact no claim before the county court judge; the case is, therefore, in that respect a strong one. Since, however, the plaintiff in the action had accepted costs under the order to stay, he was held to have acquiesced in it, and the case was formally decided upon that ground; but three of the judges (Pollock, C.B., and Parke and Rolfe, BB., Platt, B., dissenting), expressed a strong opinion upon the general question. In *Jessop* v. *Crawley* (2) the same opinion was expressed and acted upon

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of his claim to the goods state the amount he claims for damages, and the grounds upon which he claims damages."

The form of the interpleader summons to the claimant (Sched. Form 80) is as follows:—

"You are hereby summoned, &c., to support a claim made by you *to certain goods and chattels* taken in execution under the process issued, &c., and in default of your then establishing *such claim* the said goods and chattels will then be sold according to the exigency of the said process; and take notice that you are hereby required five days before the said day to deliver to the officer in charge of the said process or leave at my office *particulars of the said goods and chattels* which are claimed by you, *and of the grounds of your claim*, and in such particulars you shall set forth fully your name, address, and description, and take notice that in the event of your not giving such particulars as aforesaid your claim will not be heard by the Court."

(1) 4 Ex. 187; 18 L. J. (Ex.) 429.

(2) 15 Q. B. 212; 19 L. J. (Q.B.) 319.

by the Court of Queen's Bench; and that case is exactly similar to the present, except that there the adjudication of the county court judge upon the summons had been adverse to the claimant, whereas here it has been partially in his favour. But, even assuming the correctness of what is said there by Patteson, J., that if the decision had been in the claimant's favour it might have been otherwise, and he might have brought an action for breaking and entering, that can have no application here; because, the adjudication not being wholly in his favour, but goods of the execution debtor being in fact upon the premises, the entry is justified. But the question is set at rest by the words of the present section, which enacts that the county court judge shall adjudicate "with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff." These words, which were not in the earlier statute, are inserted for the very purpose of including a claim to special damage, and it is therefore clear that the county court judge must adjudicate upon the whole matter.

Jelf, in reply.

MARTIN, B. I am of opinion that this is a good plea, and, in saying this, I am expressing the opinion I entertained when this point was before the Court on a former occasion and received a great deal of attention. (1) The plea brings the case entirely

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(1) The case referred to was a case of *Ward* v. *Jackson*, where, upon an application made after issue joined, the master made an order to stay the action, which Montague Smith, J., on appeal, qualified by putting the defendant under certain terms; against this qualification of the order the defendant appealed to the Court, and obtained a rule, against which *Wills* shewed cause on the 3rd of May, 1870. He contended that great practical injustice would be done if the statute were taken to bar the claimant of his action for consequential damage, first, because the damage might not have accrued nor be calculable at the time of hearing the summons, and secondly, because the summons gave no notice to the claimant that he could then enforce his claim for special damage, but appeared only to refer to his claim for the goods themselves or their proceeds. *Kemplay* supported the rule.

Kelly, C.B., doubted whether the legislature intended to take away the right of action in such a case, but the rest of the Court (Martin, Bramwell, and Cleasby, BB.), were of a different opinion. The case stood over for judgment; and on the last day of term it was intimated that, on the ground of the difference of opinion in the Court, the rule would be discharged, with within the words of the statute; the entry is justified, and the only point not explicitly stated is, that the summons was issued at the request of the high bailiff; but, by the Act, this must have been so. The case then being within the words of the statute, s. 31 says expressly that the order made shall be final and conclusive. This is equivalent to saying that the whole matter between the parties shall be at an end; and I have no doubt that the words were inserted with that very intention. The legislature directed this measure to meet the exigencies of common affairs, notwithstanding that in some exceptional and doubtful cases a hardship may be inflicted. My Brother Channell has desired me to say that he is of the same opinion. (1)

Cleasby, B. This plea is in substance a plea of res judicata; it shews that though the particular claim of special damage was not in controversy, the subject-matter out of which it arose was, and that in that proceeding a claim of special damage was properly open to adjudication. If the plaintiff had made his claim then, it could not be said that it could now be agitated again. But it is the same thing if the reason why the judge did not adjudicate upon it was that the plaintiff did not give particulars of his claim.

Judgment for the defendant.

Attorneys for plaintiff: *Doyle & Edwards, for H. Jones, Colchester.*

Attorneys for defendant: *Paterson, Snow, & Burney, for A. M. White, Colchester.*

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liberty to the defendant to plead the matter in defence, so that the question might, if it was desired, be brought before the Court of Error; Martin, B. also expressing an opinion that an application to stay after issue joined was too late. It was in consequence of what took place on that occasion that the matter was pleaded in the present case, instead of being made ground of a motion to stay.

(1) Channell, B., had left the court.

1870
Nov. 21.

Aff Ca 228
31, 249, 282
-719

BYRNE *v.* SCHILLER AND OTHERS.

Ship and Shipping—Charterparty—Payment on account of Freight.

The plaintiff chartered a vessel to the defendants for a homeward voyage from Calcutta, with an option to the defendants to send the vessel on an intermediate voyage at a freight therein mentioned, "such freight to be paid as follows:—1200*l.* in rupees to be advanced the master by the freighters' agents at Calcutta against his receipt, and to be deducted, together with 1¼ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge in cash as customary." By another clause the master was to "sign bills of lading at any current rate of freight required without prejudice to the charterparty; but not under chartered rates, except the difference is paid in cash."

The defendants elected to send the vessel on the intermediate voyage, and paid the 1200*l.*, but induced the master, whom they required to sign bills of lading at a rate below the chartered rate, to postpone payment of the difference till the cargo was complete; the difference amounting to a less sum than 1200*l.*, they then claimed to have satisfied their obligation by the £1200 already paid, and refused further payment. The vessel was lost on her way out to sea. In an action for the difference:—

Held, that the plaintiff was entitled to the 1200*l.*, and also to the difference.

Affd post 319 Ex. Ch

SPECIAL case stated in an action on a charterparty, dated the 4th of February, 1868, by which the plaintiff's ship *Daphne* was chartered to the defendants for a voyage from Calcutta to London or Liverpool.

The charterparty contained the following clause: "The freighters to have the option, to be declared within twenty days of the vessel's arrival at Calcutta, of sending the vessel (subject to the general provisions of this charterparty) on one intermediate voyage from Calcutta, at their option, either to Port Louis, Mauritius, or to Colombo, with a full and complete cargo of rice in bags, paying freight on the same at and after the rate, if to Port Louis, of 1 rupee 12 annas, and if to Colombo of 1 rupee 8 annas per bag of rice (of 2 bazaar maunds intake weight) delivered; such freight to be paid as follows: 1200*l.* in rupees to be advanced the master by the freighters' agents at Calcutta against his receipt, and to be deducted, together with 1¼ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge in cash as customary."

After various clauses not relating to the intermediate voyage, the following clause occurred:—"The master to sign bills of lading at any current rate of freight required, without prejudice to the charterparty; but not under chartered rates except the difference is paid in cash."

On the arrival of the ship at Calcutta in December, 1868, the defendants elected to send her on an intermediate voyage to Port Louis, and freights being low, they required the master to sign bills of lading at a rate considerably below the charterparty freight.

On two bills of lading being presented to the master for signature at 1 rupee 6 annas per bag (the portion of cargo they represented being then on board), he refused to sign them without being paid in cash the difference between that rate of freight and the charterparty freight; but on the defendants assuring him that all would be made right when the vessel had finished loading, he signed the two bills, and from time to time signed other bills for the residue of the cargo, all at a rate of freight below the charterparty freight.

The total freight at the charterparty rate would have been 3382*l.*; and the bills of lading freight fell short of this sum by 737*l.*

On the 2nd of March, 1869, the ship being ready to sail, the master demanded of the defendants payment in cash of the difference, but the defendants refused, claiming to have it set off against advances made by them on account of the ship.

On the 3rd of March the ship sailed; and after some delay caused by the state of the tides, which compelled her to return to Calcutta for assistance, she was totally lost on the 10th of March on her way down the river.

Various disbursements had been made by the defendants at Calcutta on account of the ship, in respect of which they claimed credit for a sum exceeding 1200*l.*; certain items in this account were disputed by the plaintiff, whose calculation reduced the amount below 1200*l.*, and who sought in this action to recover that difference, in addition to the difference of 737*l.*; but in the course of the argument it was agreed that the question should be limited to the issue of whether the plaintiff was entitled to recover the 737*l.* in addition to the 1200*l.*

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R. G. Williams (*Edwards* with him), for the plaintiff. The plaintiff contends that the defendants were bound to pay 1200*l.* at Calcutta in respect of the intermediate freight, before the commencement of the voyage, whatever the rate of freight might be, and also bound before the same time to pay in cash the difference between the chartered freight and the bills of lading freight if the latter were at a lower rate than the former; and this is in exact agreement with the words of the charterparty. The plaintiff's right under the first head is clearly established by the case of *Hicks* v. *Shield* (1), which shews that where the sum to be paid is not a loan or advance but a prepayment of freight, the shipowner cannot be called upon to refund it, although, owing to the loss of the ship, no freight is earned; the law on this point is correctly stated in Maude and Pollock on Shipping, 3rd ed. pp. 269, 270. That the sum of 1200*l.* stipulated for is of this character is shewn by the stipulation as to insurance, the test applied in *Hicks* v. *Shield* (1), and which is here satisfied. That the second payment is also a payment of freight is too clear for argument, it is a payment of that part of the chartered freight which is not covered by the bills of lading freight. It became due as soon as the cargo was put on board, and the right to recover it is not affected by the loss of the vessel: *Yeames* v. *Lindsay* (2); *Carr* v. *Wallachian Petroleum Company, Limited.* (3) The only ground, therefore, on which the defendants can rest their case is that the two clauses are dependent, and the one restricted by the other. But there is nothing to justify that assumption, they are distinct in form and in position; the former is attached to the provision allowing the charterer the benefit of an intermediate voyage, the latter to a provision giving him the privilege of having bills of lading signed at such freight as he shall choose, and equally applicable to the homeward and to the intermediate voyage.

Butt, Q.C. (*Baylis* with him), for the defendants. That the defendants were liable to pay the 1200*l.* is not disputed, and *Hicks* v. *Shield* (1) carries the matter no farther than this; but they deny their liability to pay the difference in addition. The object of the stipulation as to the payment of the difference in cash is to

(1) 7 E. & B. 633; 26 L. J. (Q.B.) 205. 3 Jur NS 715
(2) 3 L. T. (N.S.) 855.
(3) Law Rep. 1 C. P. 636.

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secure to the shipowner that part of the chartered freight in respect of which he loses his lien by allowing the master to sign bills of lading for a lower rate. Obviously the two clauses are to be read in connection with one another, and no sum is to be paid in respect of the differences eo nomine, unless in fact the differences exceed 1200*l.* In the words of the charterparty, the defendants have paid the difference of 737*l.* in cash, namely, by paying the 1200*l.* Further, the difference which is to be paid under the second clause is not, like the 1200*l.*, a sum which is to be paid in all events. The indicia on which the Court relied in *Hicks* v. *Shield* (1) are here wanting, and on the loss of the vessel any payments made under that head could be recovered back by the defendants; that being so, the plaintiff cannot recover what he would be bound immediately to refund.

R. G. Williams, in reply.

MARTIN, B. Upon the substantial question in this case my opinion, founded upon the words which the parties have thought fit to use, is that the plaintiff is entitled to our judgment. The question turns upon the clause relating to the intermediate voyage, and it appears to me that there is no ambiguity in the language used. The defendants were to be at liberty to put on board a cargo at the rate of 1 rupee 12 annas per bag of rice delivered. The plaintiff was in that event to have 1200*l.* in hand, which was to be deducted on the final settlement; the remainder was to be paid on right delivery at Port Louis. He had a vested right of action for that 1200*l.* on the vessel being directed by the defendants on the intermediate voyage. According to the case of *Hicks* v. *Shield* (1) this sum was to be considered as an advance of freight and could not be treated as a loan, or recovered back in the event of freight not being earned. The Court of Queen's Bench based their decision in that case on the stipulation that insurance was to be deducted on the final settlement, which they regarded as conclusive evidence that the money was to be treated as an advance of freight, and was not to be recovered back in the event of a loss of the vessel. We are bound to act on that decision, which is not unreasonable, and it applies in terms to the present case. But

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(1) 7 E. & B. 633; 26 L. J. (Q.B.) 205. 3 Jur NS 715

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there is a further provision in the charterparty which assumes that the freight obtained may not be so much as the charterparty freight, and provides that, in that event, the master shall not sign bills of lading for the lesser rate of freight unless he is paid the difference in cash. This is an event not contemplated in the previous clause, which is wholly independent of the rate of freight; the payment it provides for is, therefore, a distinct payment in addition to the 1200*l.* stipulated for above. Then, looking at what took place at Calcutta, the plain meaning of it was, "if you will wait till all the cargo is ascertained, and we can calculate the total amount, we will then pay cash for that total amount instead of paying upon each bill of lading separately."

The only other question is, whether the defendants, in the event which has happened, are entitled to recover back the amount which ought to have been so paid. I think they are not. Taking the whole together the plaintiff was to be entitled to the whole of both sums, provided it did not exceed the charterparty freight.

CHANNELL, B. I am of the same opinion. The case of *Hicks* v. *Shield* (1) is binding on us, and the argument used by the Court of Queen's Bench is equally, and indeed more strongly, applicable here. It is not only said that "such freight" shall be paid in part by the sum of 1200*l.*, excluding the notion of its being merely an advance or loan, but it is also stipulated that that sum with insurance and commission shall be deducted on the final settlement. Again, there is no reason to say that the difference which was, according to the other clause, to be paid in cash was to be included in the 1200*l.*, or that the clauses are in any way dependent on each other. Lastly, if the defendants had, according to the further stipulation, paid the difference of freight in cash, they could not have recovered it back on the ground of the loss of the vessel. The payments are distinct, and the plaintiff is entitled to both sums.

Judgment for the plaintiff for 737*l.*

Attorneys for plaintiff: *Chester & Urquhart.*
Attorney for defendants: *R. T. Lattey.*

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(1) 7 E. & B. 633; 26 L. J. (Q.B.) 205. 3 Jur Ad 715

MAKIN *v.* WATKINSON.

1870
Nov. 22.

Landlord and Tenant—Lease—Covenant to repair—Notice of want of repair.

Upon a covenant by the lessor to keep in repair the main walls, main timbers, and roofs of the demised premises, the lessor cannot be sued for non-repair, unless he has received notice of want of repair:—So

Held, by Bramwell and Channell, BB.; Martin, B., dissenting.

7 QB 554
1CPD83,-5
5CPD508
511,

Declaration upon a covenant contained in a lease of a mill and other buildings with machinery and fixtures, by which the lessors (of whom the defendant was one) covenanted with the plaintiff (the lessee) that they would at all times during the demise, at their own expense, maintain and keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order, and condition; alleging performance of conditions precedent, and a default in repairing whereby, &c.

Plea: That the plaintiff gave no notice to the lessors of any want of repair in the main walls, main timbers, and roofs, nor that the same were not in good and substantial order and condition.

Demurrer and joinder.

Wills was called upon to support the plea. The only direct authority for the plea is a dictum of Mansfield, C.J., and Gibbs, J., in *Moore* v. *Clark* (1), that "the lessor may charge the lessee without notice; for the lessor is not on the spot to see the repairs wanting; the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that repairs are necessary." The justice of this is the more obvious if its principle is applied to a similar case, that of a watchmaker selling a watch with an agreement to keep it in repair for six months; it is plain that he could not be sued for non-repair unless the buyer required repairs to be done. The lessor in the one case, and the watchmaker in the other, not only would not, but could not, know that repairs were wanted unless notice was given, for they would have no right to insist upon examining the premises or the watch, and would be guilty of a trespass if they did so against the will of the possessor. The dictum above cited is supported by several analogous cases. In Com. Dig. Condition, L. 10, it is laid down that "if a condition be that the lessee repair, and that the lessor find timber, the lessee ought to demand timber, and give notice how much will be sufficient."

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(1) 5 Taunt. at p. 96.

[BRAMWELL, B., referred to L. 8, "if a condition, covenant or promise be to pay as much for goods as every other pays; the obligee shall give notice how much another pays."]

In Vin. Abr. Condition. A. d. pll. 13, 38, it is laid down that when the condition is an act to be performed by a stranger, the obligor must take notice at his peril; but in the case cited in the latter placitum (*Pollen* v. *Kingesmeal*, as stated in the margin) and in *Harris* v. *Ferrand*, reported in Hardr. 41, and cited in Vin. Ab. Notice. A. 2, pl. 12, the principle is more fully and more correctly stated that, "notice is not necessary where the thing lies as much in the cognizance of the one as the other; but where it lies more properly in the cognizance of the plaintiff than of the defendant notice is necessary." That principle was acted upon in *Vyse* v. *Wakefield* (1), and is entirely applicable to this case.

[MARTIN, B. A distinction has always been made between a condition and a covenant.

CHANNELL, B. The principle has been laid down that where notice or demand is merely formal, the bringing of the action is sufficient notice, but not otherwise.]

Here the notice is essential; if the lessor is to have no notice, extensive repairs may have been executed by the tenant, of which the lessor knows nothing, and of the necessity of which he has, after they are done, no means of judging, but for which he may be compelled to pay; and he may be made liable for consequential damage which he had no opportunity of preventing.

[BRAMWELL, B. The case would be different if the covenant were, on the making of the lease, to *put* in repair. But the plaintiff's contention would reduce the lessor to a dilemma; if he went on the premises to repair, and repairs were not needed, he would be liable to be sued in trespass; if he did not go and repairs were needed, he would be liable for consequential damage, and he could have no knowledge whether they were or were not needed.]

Kemplay, in support of the demurrer. If the defendant is right there is no difference between a covenant to repair and a covenant to repair on notice. The rule is, that notice is not necessary unless it is stipulated for by the contract: see 1 Wms. Saund. 116, note to *Cutler* v. *Southern*, and 2 Wms. Saund. 62, n. (4), where all the authorities are collected: *Cole's Case.* (1)

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(1) 6 M. & W. 442.

[BRAMWELL, B. The covenant in *Cole's Case* (1) was to *save harmless*, but if it had been merely to indemnify, must not notice have been given of the damnification ?]

The defendant's view cannot be sustained without adding words to the covenant, and there is no authority for such addition.

[BRAMWELL, B. Words were added in *Vyse* v. *Wakefield*. (2) The question is, whether in reason the covenant does not require the addition; we must construe it if possible as a covenant made by reasonable people.]

It is not necessary for that purpose to add words; there is nothing unreasonable in it as it stands; the lessee being under an obligation to repair would have an implied licence to do all things necessary. The dictum in *Moore* v. *Clark* (3) was not necessary to the case; on the other hand, *Coward* v. *Gregory* (4) is in favour of the plaintiff.

[BRAMWELL, B. There the covenant was to put the premises in repair, which implied they were out of repair.]

CHANNELL, B. I am of opinion that this is a good plea. The declaration is good, because it avers the performance of conditions precedent, which would include a request if a request is necessary. The question is, whether the plea denying the giving of notice is a good defence. I agree that the case of *Moore* v. *Clark* (3) is not an authority; because, although what was said there upon this point was said by two very eminent judges, one of them (Gibbs, J.), peculiarly conversant with pleading, and was illustrative of the matter under discussion, yet it was not necessary to the determination of the case. We must, therefore, look at the question apart from direct authority and upon general principles. And, looking at it in this way, *Vyse* v. *Wakefield* (2) is, to some extent, an authority, for it warrants the proposition that, when a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd the covenant may be, it cannot be varied.

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(1) Cro. Eliz. 97.

(2) 6 M. & W. 442.

(3) 5 Taunt. at p. 96.

(4) Law Rep. 2 C. P. 153.

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Now here repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might, by observation, acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of *Vyse* v. *Wakefield* (1), we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good.

BRAMWELL, B. I am also of opinion that the plea is good. To hold it to be so we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession; he can say to the lessor: "You shall not come on the premises without lawful cause;" and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed he will be a trespasser; if he does not come,

(1) 6 M. & W. 442.

he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification suggested.

As to the authorities, we have, in the first place, an obiter dictum of two eminent judges, which was appropriate to the matter in hand, and is, therefore, of great value, though not binding. The authorities on analogous cases, collected in Comyn's Digest, are by no means clear; some seem one way, some another, and one, which occurs under the title Condition, L. 9, is very much in favour of the plaintiff. The case there referred to is *Fletcher* v. *Pynsett* (1), where, it appears, the defendant covenanted with the plaintiff that, if he would marry the defendant's daughter, the defendant would assure to him a certain copyhold; and it was held that the plaintiff was entitled to sue without giving notice of the marriage. It seems to be suggested that, when the engagement is conditional upon the doing of an act by a third person, notice must be taken from that person. But this cannot be the reason of the rule, for, in a case put under L. 8 of the title I have referred to, it is said that a promise to pay as much for goods as any other pays requires a notice of how much another pays. (2) But there seems no reason why the obligee should be less bound to give notice, or the obligor more bound to take notice of the act of a stranger than of the act of the obligee himself, as in some of the cases put in L. 9, where it is said notice is not necessary.

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(1) Cro. Jac. 102; see to same effect, Roll. Abr. Cond. C. 1, 2, 3, 4 under the heading "At what time performance should be when no time is limited."

(2) *Holmes* v. *Twist*, the case there referred to, was decided by the Exchequer Chamber, reversing the judgment of the King's Bench, some judges of the Court below agreeing with the judgment of reversal (Hob. 51); the reason there assigned was, that the price was "a thing of his (the plaintiff's) private knowledge, and not like the case of bond to perform the award;" in Cro. Jac. 432, where the same case is referred to in a similar case of —— v. *Henning* (*Haul* v. *Hemings*, in 1 Roll. Rep. 285), it is said a difference was taken "if the agreement be that he shall pay so much as J. S. in particular payed; in that case quia constat de personâ, and he is indifferently named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice." The latter reason seems to be adopted by Parke, B., in *Vyse* v. *Wakefield* (6 M. & W. at pp. 453, 454), as the ratio decidendi of these cases.

If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.

To have inserted a provision in the covenant requiring notice would certainly have been very reasonable. When it is a question of putting it into the covenant by implication, one must needs, as in all such cases, have great doubt; but upon the whole, looking to the authorities, and bearing in mind what is said in *Moore* v. *Clark* (1), I think we are warranted in so reading the covenant.

Martin, B. I am of opinion that this plea is bad. I think that when we are construing a contract we ought to adhere to its words, and not insert words not to be found in it; otherwise it is impossible for the parties to know what are the obligations they have bound themselves to, or for counsel to advise with certainty. Now the declaration states a covenant by the defendant to keep in good and substantial repair, and that the defendant did not keep in repair. In answer to this the plea alleges that there was no notice of want of repair. I think this plea bad, and for the simplest reason, that no such stipulation is contained in the covenant, nor anything from which such a stipulation can be inferred.

I cannot perceive that the covenant as it stands is so unreasonable as is alleged. Moreover, there are in leases covenants to repair generally, and covenants to repair on notice; but if this covenant is construed in the way proposed, it is idle to require notice in terms; the one covenant will do as well as the other.

The authorities appear to me directly against the plea. The proposition laid down by Mr. Cowling arguendo in *Vyse* v. *Wakefield* (2) is, I apprehend, perfectly correct: "The general rule is, that a party is not bound to do more than the terms of his contract oblige him to do;" and all the judgments support what he says. Lord Abinger, C.B., says (3): "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it." Now, the assumption in the present case that the defendant cannot know without notice is, in my judgment, idle. Parke, B., says (1): "The general rule is, that a party is not entitled to notice unless he has stipulated for it; but," he adds, "there are certain cases where, from the nature of the transaction, the law requires notice to be given, though not expressly stipulated for;" he proceeds to describe those cases as cases where the thing to be performed is indefinite, and at the option of the plaintiff; and he decides the case before him on the ground that an option still remained to be exercised by the plaintiff. The present transaction is not of such a nature. Lastly, Rolfe, B., says (2): "I own that when the case was first opened my impression was in favour of the plaintiff; and for this reason, that when a party enters into a contract, he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable: but that is not so when a party contracts to do a particular act; for then it is his own fault for entering into such a contract." I entirely agree with the rule of law so stated, and therefore think that we are not at liberty to import any such stipulation into this covenant as the defendant claims.

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(1) 5 Taunt. at p. 96.

(2) 6 M. & W. at p. 446.

(3) 6 M. & W. at p. 452.

Judgment for the defendant.

Attorney for plaintiff: *W. Flower.*
Attorney for defendant: *Jewin.*

(1) 6 M. & W. at p. 453.

(2) 6 M. & W. at p. 456.

1870
Nov. 22.

WHITE *v.* HUNT.

Creditors' Deed—Assignment of Lease—Acceptance of Lease.

By a deed for the benefit of creditors (executed after the repeal of 2~~5~~ & 2~~6~~ Vict. 4/ 5/ c. 134) the debtor assigned to the defendant all his personal estate, and the defendant executed the deed, and acted under it. In the personal estate was included a lease as to which the defendant did no act specifically accepting it. In an action by the landlord for rent:—

Held, that the lease had passed to the defendant, and that he was therefore liable.

Appeal from the decision of the deputy judge of the Wilts County Court at Melksham, on a plaint for rent.

The plaintiff was owner of a public-house, lately occupied by one Bolton, on a tenancy from year to year, under which half a year's rent became due at Lady Day, 1870, which was the rent sued for. The defendant was a trustee for creditors, to whom Bolton had, by a deed dated the 28th of February previous, assigned all his "goods and chattels and personal estate." The defendant had executed the deed, and had acted under it in realizing the goods and chattels comprised in it which were upon the premises, and for that purpose had entered and used the premises; but he had not, it was contended, done any act to shew his acceptance of the lease. The deputy judge found, as a fact, that there had been no actual acceptance of the lease by the defendant; but nevertheless held that it passed to him by virtue of the assignment, no disclaimer of it having been made, and that he was therefore liable for the rent. The defendant appealed.

Finlay, for the defendant. The defendant never having accepted this lease, cannot be made liable for rent. This is the case of a composition deed with creditors; and there being in the late Bankruptcy Act, 1869, no provision for such deeds, the question must be determined according to the rules which governed such deeds before that Act, and independently of the now repealed Act of 1861 (24 & 25 Vict. c. 134), by which they were, for the first time, expressly provided for, and in analogy to the decisions which have been made under the latter statute with reference to deeds registered under it. Now, with respect to assignees in bankruptcy, it was decided in *Copeland* v *Stephens* (1), that the general assignment of the bankrupt's estate did not vest in them a lease until acceptance; and in *Carter* v. *Warne* (2) Lord Tenterden applied the same rule to a common creditors' deed. In *Porter* v. *Kirkus* (3) the 145th section of the Act of 1849 was held applicable to deeds registered under s. 192 of the Act of 1861. It has been thought that the authority of *Carter* v. *Warne* (2) has been shaken by *How* v. *Kennett* (4), and this was the opinion of the learned judge of the county court; but in *How* v. *Kennett* (4) it was not necessary to decide the question, and the case of *Carter* v. *Warne* (2) was not even dissented from. That case is therefore the ruling authority, and it is supported by *Ringer* v. *Cann* (5), where it was thought necessary to ask the jury whether the assignees had accepted the lease in respect of which they were sued.

Field, Q.C., for the plaintiff. The question is the same as that decided in *Williams* v. *Bosanquet* (6), and is in no way influenced by *Copeland* v. *Stephens* (1), which was decided with reference to the words and the intention of the Bankruptcy Acts, and upon an assignment made under a statutory power. If the parties choose, as they have done here, to conduct their affairs at common law, instead of taking the protection of the statute, they do it at their own risk, and cannot obtain any assistance from the statute, the provisions of which they have elected to disregard. It is true tha in *How* v. *Kennett* (4) the doctrine laid down in *Carter* v. *Warne* (2) was not directly overruled, but it was described by Patteson, J. (7), as "new," and cannot, it is submitted, be supported.

Finlay, in reply.

MARTIN, B. My opinion upon this case is not so strong as that of my learned Brethren; but as they are clear upon the point, I do not hesitate to express what has always been my opinion, that if a man, whether as an assignee for creditors, or in his own right, takes an assignment of property, it becomes his by virtue of that assignment, without any further act of acceptance.

(1) 1 B. & A. 593.
(2) 1 Mood. & M. 479.
(3) Law Rep. 2 C. P. 590.
(4) 3 Ad. & E. 659.
(5) 3 M. & W. 343.
(6) 1 B. & B. 238.
(7) 3 Ad. & E. at p. 666.

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BRAMWELL, B. I am of the same opinion. If this had been a purchase, no one could have doubted that the assignee took the lease. Then what is the difference here? The defendant is assignee of the lease by an instrument which he has executed, and under which he has acted. If Lord Tenterden had pronounced his opinion in *Carter* v. *Warne* (1) after consideration, I should have hesitated to overrule it; but it was an opinion expressed in the hurry of nisi prius business, and is a little blown upon in *How* v. *Kennett.* (2) I think we may therefore look at the matter as one of principle; and so dealing with it, my opinion is that the learned county court judge was right, and that our judgment must be for the plaintiff.

CHANNELL, B. It is no doubt true that in bankruptcy, by reason of the language of the statutes, an assignee in bankruptcy may, notwithstanding the vesting in him of the bankrupt's general estate, refuse a lease which he regards as a damnosa hereditas, and that he is not taken to have accepted it unless he does some act which unequivocally testifies his acceptance. But in the case of an assignment at common law the property would, without any actual acceptance, clearly pass, although an assignee who had never executed the assignment would be entitled to disclaim. I have some doubt whether Lord Tenterden expressed his opinion in *Carter* v. *Warne* (1) entirely in the way appearing in the report. If, however, that case is to be treated as accurately representing his view, I cannot assent to it.

Judgment for the plaintiff.

Attorneys for plaintiff: *Doyle & Edwards.*
Attorney for defendant: *Bartrum, Bath.*

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(1) 1 Mood. & M. 479.

(2) 3 Ad. & E. 659.

MOODY *v.* STEWARD.

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Nov. 21.

4 CPD 30-1

County Courts Act, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 10—*Case sent to be tried in the County Court.*

After an action has been sent to be tried in a county court under 30 & 31 Vict. c. 142, s. 10, the court in which the action was brought has no jurisdiction over the costs, and cannot make an order to tax.

THIS was an action for slander, originally brought in this court, but sent for trial to the Greenwich County Court, under 30 & 31 Vict. c. 142, s. 10. A verdict was obtained for 5*l.*, but the judge who tried the cause declined to make any order as to costs, being of opinion that he had no jurisdiction as to them, at any rate as to those which were incurred before the cause was sent down. A summons was taken out at Chambers calling on the defendant to shew cause why it should not be referred to a master to tax the plaintiff's costs. The summons was heard by Willes, J., and was referred by him to the Court.

Nov. 19. *Pearce* moved accordingly. He cited *Craven* v. *Smith* (1), and contended that at least the costs incurred in this court must be taxed here.

[BRAMWELL, B., referred to the words of the section (2), and asked whether the Court had any jurisdiction to tax costs.]

The cause remains in the court for some purposes. In *Taylor*

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(1) Law Rep. 4 Ex. 146.

(2) 30 & 31 Vict. c. 142, s. 10, enacts that the defendant in any action of tort may, on satisfying certain conditions, obtain an order from any judge of the court where the action is brought remitting the cause for trial before a county court to be named in the order; that "thereupon the plaintiff shall lodge the original writ and order with the registrar of such county court, who shall appoint a day for the hearing of the cause . . . and the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court; and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the superior court shall be allowed according to the scale of costs in use in the county courts, and the costs of the proceedings in the superior court shall be allowed according to the scale in use in such latter court."

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v. *Cass* (1), an order to tax was obtained upon the county court judge's certificate.

[PIGOTT, B. The section gives costs to be taxed according to the scale in the superior court, that is all.

BRAMWELL, B. We will speak to my Brother Willes.]

Cur. adv. vult.

Nov. 21. BRAMWELL, B. We have considered this case, and for the purposes of the present application it will be sufficient to say that we are of opinion that we have no power to make the order. The whole cause has gone to another court, and is no longer within our jurisdiction. That is sufficient to dispose of the matter; but we will add the expression of our opinion that there is full jurisdiction in the judge of the county court.

PIGOTT, B., concurred.

Rule refused.

Attorney for applicant: *Pook.*

Nov. 22.

9 Ex 88

M'KEAN AND OTHERS *v.* M'IVOR AND OTHERS.

Carriers—Misdelivery—Fictitious Order.

The plaintiffs being imposed upon by a fictitious order sent by H., a person employed by them to obtain orders, forwarded goods by the defendants, who were carriers between Liverpool and Glasgow, addressed to C. Tait & Co., 71, George Street, Glasgow, that being the name and address given them by H. In fact, there was no such firm as C. Tait & Co., but H. had made arrangements at 71, George Street, for receiving letters, &c., addressed there under that name. On the arrival of the goods at Glasgow, the defendants, following the course of business usual with carriers between Liverpool and Glasgow, sent a notice to the address appearing on the goods, requesting their removal, and stating that the notice must be produced, indorsed as a delivery order. This notice was received by H., who indorsed it "C. Tait & Co.," and upon presenting it so indorsed, obtained delivery of the goods. In an action against the defendants, as carriers, for misdelivery:—

Held, that the defendants, having followed the usual course of business, which must be read as part of the plaintiffs' directions, had obeyed the plaintiffs' directions, and were not liable.

SPECIAL CASE, stated in an action brought to recover damages for the misdelivery and conversion of goods of the plaintiffs.

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(1) Law Rep. 4 C. P. 614.

The plaintiffs are flour and starch merchants at Manchester, and the defendants are carriers by water between Liverpool and Glasgow.

On the 20th of March, 1867, Heddell, a person employed by the plaintiffs to obtain orders in Glasgow, represented to them that he had obtained an order for a parcel of goods from F. Cowie & Co., of 11, West Nile Street, Glasgow. There was in fact no such trading firm as F. Cowie & Co.; but Heddell and one Cowie had, for the purpose of this fraud, taken an office at the address named, where they had put up the name of F. Cowie & Co., and where they from time to time received letters, notices, and parcels. On the 29th of March the plaintiffs delivered to Thompson, M'Kay, & Co., carriers, at Manchester, the goods supposed by them to have been so ordered, with a direction to forward them to F. Cowie & Co., 11, West Nile Street, Glasgow, by canal to Liverpool, and thence by steamer to Glasgow; and on the same day wrote to Heddell, at his own address, and also to F. Cowie & Co., at 11, West Nile Street, announcing the despatch of the goods. The goods were forwarded by Thompson, M'Kay, & Co. to Liverpool, and there delivered by them to the defendants for carriage to Glasgow, the defendants knowing nothing of the plaintiffs, except that their names appeared on the way-bill as senders of the goods. The sum of 1*s.* 6*d.* was paid by the plaintiffs to Thompson, M'Kay, & Co. on the delivery to them of the goods, on account of the carriage from Manchester to Glasgow; the defendants collected at Glasgow the balance of the through freight, accounting to Thompson, M'Kay, & Co. for the cost of carriage between Manchester and Liverpool.

On the arrival of the goods at Glasgow, the defendants, following the course of business always pursued by carriers of goods between Liverpool and Glasgow, caused a notice to be sent to F. Cowie & Co. at the address named, notifying the arrival of the goods, requesting the consignees to send for them, and stating that the notice must be produced indorsed as a delivery order. The notice was delivered at 11, West Nile Street, and came to the hands of Heddell and Cowie. Heddell, in the name of F. Cowie & Co., indorsed the notice with an order to deliver the goods to one John Thom, a respectable trader in Glasgow, to whom the

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goods were delivered by the defendants on the production of the notice so indorsed.

On the 28th of April another parcel of goods was sent by the plaintiffs to F. Cowie & Co. under precisely similar circumstances, and was similarly delivered by the defendants on the production of their notice, indorsed by Heddell in the name of F. Cowie & Co.

On the 1st of May Heddell telegraphed to the plaintiffs that he had obtained an order from C. Tait & Co., of 71, George Street, Glasgow; and on the following day the plaintiffs forwarded the goods telegraphed for under precisely similar circumstances with the two former parcels. There was, in fact, no such firm as C. Tait & Co.; but Heddell had made arrangements (but not in conjunction with any person named Tait) for receiving at 71, George Street, letters, notices, &c., addressed there to C. Tait & Co. Accordingly, the notice sent by the defendants was received by Heddell, who indorsed it in the name of C. Tait & Co., and on the production of the order so indorsed obtained delivery of the goods from the defendants.

The carters who were sent to obtain the delivery of the goods from the defendants, and to whom the goods were delivered on the production of the indorsed notices, were in each case carters in the employment of respectable firms of carters in Glasgow.

All three parcels of goods were disposed of by Heddell, and the moneys applied by him to his own purposes.

The defendants in all respects acted bonâ fide, and followed the usual course of business as above described.

The Court was to be at liberty to draw inferences, and the question for their opinion was, whether the defendants were liable to the plaintiffs in respect of all or any, and which, of the said parcels of goods. (1)

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(1) This case originally came before the Court on demurrer to a plea in which the above facts were partially stated. The Court gave judgment against the plaintiffs (reported 18 L. T. (N.S.) 410); error was brought upon this judgment, and the case came on for argument in the Exchequer Chamber on the 20th of June, 1868. The Court then observed that a plea was an inconvenient method of raising the defence, and suggested that a special case should be stated; and, a technical error appearing in the entry of the judgment below, by consent of the parties the judgment was quashed, and a judgment of repleader awarded, the parties to state the facts for the opinion of the Court of Exchequer.

Holker, Q.C. (*Bryce* with him), for the plaintiffs. It may be admitted that if the carriers had no means of exercising a judgment as to the circumstances under which delivery was claimed, they would have been guilty of no negligence. But they had greater means of knowledge than the plaintiffs; they were on the spot, and could have made inquiries; but without inquiry they did an act which enabled Heddell to obtain possession of the goods.

[MARTIN, B. It is here found as a fact that the custom was to send a notice in the mode which they adopted. If that was the usual mode, it must be taken to have been known to the plaintiffs, and to have been incorporated into their direction to the carriers. In what respect, then, did the defendants not obey the plaintiffs' directions?]

As to the third parcel at least, if they had exercised proper care in carrying out those directions, and made inquiries, they would have discovered that there was no C. Tait & Co.

[BRAMWELL, B. I can see no want of reasonable care. Did not the persons designated as C. Tait & Co. in fact get the goods? If so, the defendants are clearly in the right.]

They did not get them, for there were no such persons. The case is the same as if the goods had been stolen, in which case the defendants would be clearly liable. The case of *Stephenson* v. *Hart* (1) is in point; the circumstances there were very similar to those of the present case.

[BRAMWELL, B. There were circumstances there to excite suspicion; but, I think the reasoning of Gaselee, J. (2), who dissented from the judgment of the Court, is right; there was nothing to shew that it was not West who received the box; it may rather be collected that it was.]

Duff v. *Budd* (3) is also in point.

[MARTIN, B. The parcel was directed there to an actual person, and was delivered to another person under circumstances of negligence.]

At any rate, the goods here were not delivered to the persons to whom they were addressed, for there were no such persons.

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(1) 4 Bing. 476.

(2) 4 Bing. at p. 488.

(3) 3 B. & B. 177.

There was therefore a misdelivery, for which the defendants are answerable: *Garside* v. *Trent & Mersey Navigation.* (1) He also referred to the judgment on the demurrer in this action (2).

C. Russell (*Milward, Q.C.*, with him) for the defendants. First, there was no contract between the plaintiffs and defendants; the contract was with Thompson, M'Kay, & Co.: *Muschamp* v. *Lancashire & Preston Junction Ry. Co.* (3)

[THE COURT. That is clearly so.]

Secondly, there has been no negligence and no misdelivery; the defendants have exactly pursued the plaintiffs' orders, when those orders are interpreted by the custom.

[CHANNELL, B. The finding upon this is clear; there was a bonâ fide custom.

BRAMWELL, B. It is admitted that the order was to deliver at the address, or wherever else the consignees might direct. The only question is, did the consignees give any direction?]

The plaintiffs cannot say they did not; the person who had assumed that name from the outset, and who received letters addressed to that name at 71, George Street, was the person who gave the direction. If the defendants had gone to the place and inquired, they would have found nothing to excite their suspicion.

Holker, Q.C., in reply.

MARTIN, B. We are all of opinion that the defendants are entitled to judgment. I will assume that this action is properly brought against the defendants, although the plaintiffs' contract was, in fact, with Thompson, M'Kay, & Co.; and, assuming that, the defendants will not be liable unless they have acted in a manner not justified by their duty to the plaintiffs. But it appears to me that they have done exactly what they were directed to do. I pass over the first two cases, in which the defendants have made what is equivalent to a delivery to Cowie & Co. at their premises. The other case is the only one that raises any difficulty. But as to this, when the plaintiffs thought fit to act upon the order which Heddell had given them in the false name of C. Tait & Co., and gave directions to the defendants to deliver goods to C. Tait & Co.

(1) 4 T. R. 581.

(2) 18 L. T. (N. S.) 410.

(3) 8 M. & W. 421.

at 71, George Street, Glasgow, I think they affirmed that there were such persons as C. Tait & Co. at that place. That they were led into that belief by the fraud of Heddell makes no matter; they did so state in fact, and the carriers had a right to assume that this statement was correct, and have a right now to say that the person to whom they delivered the goods was, as he was in fact, the person who represented himself to the plaintiffs as C. Tait & Co. But if the carrier delivers at the place indicated, or does what is equivalent to a delivery there, he does all that he is bound to do: he obeys the sender's directions, and is guilty of no wrong. To make him liable there must be some fault; it is a question of fact whether there has been any such negligence as makes him guilty of a conversion; and where he has carried out the directions of the sender, the mere fact that he has delivered the goods to some person to whom the sender did not intend delivery to be made, is not sufficient to support the allegation that he has converted them.

Bramwell, B. I am of the same opinion. We must take it that the contract was between the plaintiffs and Thompson, M'Kay, & Co.; but it is still open to the plaintiffs to say that the defendants have been guilty of a conversion. I assume that a misdelivery would have been a conversion; but the difficulty is to see that there has been any misdelivery. When the direction given by the plaintiffs is expanded as interpreted by usage, it comes to this, "Take the goods to Glasgow, and at 71, George Street, you will find a person or persons bearing the name of C. Tait & Co., who will receive the goods or give an order for them, and to whom or whose order you must deliver them." The defendants take the goods, they give the customary notice to C. Tait & Co., they receive an indorsement in that name directing delivery, and deliver accordingly. Are they not entitled to say that the order ought to be thus expanded according to the custom, and that, if so expanded, it would have justified the delivery? My difficulty was (and it only applies to the last order, for as to the first two no doubt delivery was made to the order of persons using the name of Cowie & Co.), whether it could be said that the defendants did deliver to the order of C. Tait & Co., or whether the plaintiffs might not say, "There are no such persons as C. Tait & Co.; it is true we thought there were, but there were not in fact; our direction was therefore impossible of performance; but it does not follow that you were entitled to deliver to any one else." And I have doubted whether the case was not the same as if the defendants had not written at all, but Heddell, hearing that the goods were in the defendants' hands, had come and told them to deliver elsewhere than at the address named; in which case there would be great difficulty in saying that the defendants would have discharged their duty. It would be the same as if a letter were addressed to a place where no such person lived as was mentioned in the address, and the letter were delivered to some one standing on the pavement. But the distinction is, that there were, according to the plaintiffs' statement, some persons using that name at that place, and these were the persons designated in the order as the persons to whom the defendants were to deliver. The defendants therefore may say, "We have obeyed your directions, for we have delivered to the order of persons who, at 71, George Street, were more or less using the name of C. Tait & Co., and to whom you told us to address ourselves for directions."

Channell, B. I am of the same opinion. We must view the order as if it were interpreted by the course of business. If so, there has been no such misdelivery as amounts to a conversion. The plaintiffs are, as it were, estopped from saying that there were no such persons as C. Tait & Co.

Judgment for the defendants. (1)

Attorneys for plaintiffs: *Reed, Phelps, & Sedgwick, for Sale & Co., Manchester.*

Attorneys for defendants: *Gregory & Co.*

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(1) See *Heugh* v. *London and North Western Railway Company*, Law Rep. 5 Ex. 51.

HOWARD *v.* LOVEGROVE.

1870
Nov. 8.

Contract of Indemnity—Indemnity against Costs—Taxed Costs—Extra Costs.

In an action by a lessee against the assignee of the lease for breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in the lease, the plaintiff sought to recover, among other heads of damage, the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney, incurred in unsuccessfully defending an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment:—

Held, that the lessee was entitled to recover both the extra costs paid by him to his attorney and the taxed costs.

Declaration by the lessee of one Newman against the assignee of the lease for a breach of the following undertaking addressed to the plaintiff: "I, the undersigned, William Lovegrove, hereby undertake, in consideration of your having this day assigned to me all your interest under the agreement between yourself and Mr. Newman, to indemnify you against payment of rent and performance of the covenants and conditions contained therein. 7th March, 1866." The defendant pleaded, among other pleas, a denial of the breach. Issue.

At the trial before Martin, B., at the Middlesex sittings in Michaelmas Term, 1870, it appeared that the premises demised being out of repair in the year 1869, Mr. Newman gave to the plaintiff, his lessee, who was under a covenant to repair contained in the lease, notice of the amount at which the dilapidations were valued, and of his intention to bring an action for that amount. The plaintiff communicated the contents of this notice to the defendant, his assignee, who was then in possession of the premises, and afterwards proposed to him to come in and defend the action. The defendant did not adopt this course, and Newman's action proceeded against the plaintiff, who paid 30*l.* into court. That sum was accepted by Newman and a nolle prosequi was entered. The present action was brought to recover the sum of 30*l.*, and the costs to which the plaintiff had been put in defending the action. A verdict was found for the plaintiff for 72*l.* 16*s.* 10*d.*, 12*l.* 9*s.* 4*d.* of which consisted of costs which had not been allowed on taxation between party and party, but had been paid by the plaintiff to his own attorney for services rendered in the action of *Newman* v. *Howard.*

Prentice, Q.C., moved for a rule for a new trial on the ground of misdirection and excessive damages. The extra costs beyond those allowed on taxation are not recoverable against the defendant, and the learned judge should have told the jury in assessing the damages to exclude them from their consideration. In *Sinclair* v. *Eldred* (1) it was held that in an action for malicious prosecution the plaintiff could recover no damages for extra costs, and Mansfield, C.J., (at p. 9), expresses an opinion that no action can be maintained for extra costs—i. e., costs in excess of what the law allows. In *Grace* v. *Morgan* (2), commenting on *Sandbach* v. *Thomas* (3), in an action for an excessive distress the plaintiff was held not entitled to recover any thing beyond the taxed costs of his replevin on the distress. *Sandback* v. *Thomas* (3) is an authority in conflict with these cases, but it was a nisi prius decision, and must be considered as overruled. Again, according to *Cotterell* v. *Jones* (4), an action for " extra " costs is under no circumstances maintainable. In the present case the plaintiff, it is true, sues not in tort, but on an express contract of indemnity. Still the principle of the authorities cited applies, and the only proper measure of damage here is the costs ascertained by the usual course of law.

KELLY, C.B. In this case I think there should be no rule. The plaintiff was liable in the action brought against him by Newman, and with a view of preventing further litigation, after notifying the action to the defendant, he paid 30*l.* into court in satisfaction. This he is, of course, entitled to recover. Then there are the costs incurred in defending the action, as to which the question before us arises. It is said that the defendant cannot be made liable for more than such costs as the master allows on taxation. But I am of opinion that *all* the costs the plaintiff incurred, both those allowed as between party and party, and also those properly incurred in addition between himself and his own attorney, were necessarily incurred. This being so, it would be unjust, and we should not give its full effect to the contract of indemnity entered

(1) 4 Taunt. 7.

(2) 2 Bing. N. C. 534.

(3) 1 Stark. 306.

(4) 11 C. B. 713; 21 L. J. (C. P.) 2.

into with him by the defendant if we were to deprive him of these extra costs.

MARTIN, B. I am of the same opinion. It is admitted that the plaintiff ought to recover the costs of the action brought against him by the landlord, and the question is what are these costs? I should say that they include everything which his attorney could recover against him. To give him the mere costs as taxed by the master, who acts according to a particular scale, would not be a complete indemnification. I was of this opinion at the trial, and I see no reason to alter it. It is not, in my opinion, the duty of the judge in such a case to tell the jury that as a matter of law they can give nothing beyond the taxed costs. I must add that I think the same reasoning would apply to actions of tort, and I am, therefore, unable to assent to the principle of the decisions which have been cited to us.

PIGOTT, B. I am of the same opinion. The case differs from those which have been referred to. Those were actions of tort, but here the action is for the breach of a contract of indemnity, and I think the plaintiff is entitled to recover the whole of the damages which the jury gave him. He did all he could throughout. He could not repair himself, his assignee being in possession; he could not prevent the landlord from bringing the action. When it was brought he informed the defendant, who might have taken up the defence if he had liked; but not taking that course the plaintiff paid money into court in satisfaction. Thus, from first to last he did nothing unnecessary, and these costs, both taxed and extra, appear to me the natural and necessary consequence of the defendant's breach of contract, and to be recoverable, as coming within the strict rule as to the mode in which damages should be measured.

Rule refused.

Attorney: *Hallam.*

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Nov. 24.

7 Q.B. 576
5 PC 349
10 CP 48

DURHAM *v.* SPENCE.

Writ issued for Service Abroad—Cause of Action—Common Law Procedure Act, 1852, (15 *&* 16 *Vict. c.* 76), *s.* 18.

The defendant made a promise of marriage to the plaintiff whilst both parties were residing abroad. Both afterwards came to England, where the defendant wrote a letter to the plaintiff renouncing the contract. He afterwards left the country. The plaintiff, under 15 & 16 Vict. c. 76, s. 18, issued a writ indorsed for service abroad. The defendant, having been served with the writ abroad, moved to set it aside:—

Held (by Martin, Pigott, and Cleasby, BB.; Kelly, C.B., dissenting), that the writ was rightly issued.

By Pigott and Cleasby, BB. (agreeing with *Jackson* v. *Spittall* (Law Rep. 5 C. P. 542),) that *cause of action* in s. 18 means the act or omission constituting the violation of duty complained of, and not the *whole* cause of action.

In this action a writ had been issued under 15 & 16 Vict. c. 76, s. 18, for service abroad under the following circumstances:—The defendant, whilst resident at the Cape of Good Hope, had made a promise of marriage to the plaintiff, who was then resident at Calcutta. On returning to England, he wrote a letter to the plaintiff, who was then also in England, renouncing the contract, and this was the breach complained of. He had since gone back to the Cape, where he was served with the writ in this action.

The 15 & 16 Vict. c. 76, s. 18, enacts that, in case any defendant, being a British subject, is residing out of the jurisdiction of the superior courts (except in Scotland or Ireland), the plaintiff may issue a writ in the form specified, indorsed for service out of the jurisdiction, "and it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is *a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction,* and that the writ was personally served, or, &c." from time to time to give the plaintiff liberty to proceed in the action.

Nov. 24. *Day* moved to set aside the writ and all proceedings under it. The *whole* cause of action not having arisen within the jurisdiction, the 18th section does not apply. *Sichel* v. *Borch* (1) and *Allhusen* v. *Malgarejo* (1), decided under s. 19, are in favour of this view; *Chapman* v. *Cottrell* (2) is consistent with it; and *Fife* v. *Round* (3) and *Jackson* v. *Spittall* (4) are opposed to it.

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(1) 2 H. & C. 954; 33 L. J. (Ex.) 179. 10 Jur N.S. 167

Petheram shewed cause in the first instance, and referred to Day's Common Law Procedure Acts, pp. 18, 19 (3rd. ed.)

Day, in reply.

Cur. adv. vult.

Nov. 25. The following judgments were delivered:

Pigott, B. There is unfortunately a difference of opinion in the Court on this case, and I have now to express my own opinion, which is in accordance with the doubt I expressed in the earlier case in this Court of *Sichel* v. *Borch.* (5) Since that decision a case has occurred in the Court of Common Pleas, in which, in a very clear and elaborate judgment, the learned judges of that court came to a conclusion contrary to the case of *Sichel* v. *Borch* (5) and the case of *Allhusen* v. *Malgarejo* (1) in the Queen's Bench, which followed it.

After full consideration I adopt the view taken in the Court of Common Pleas in *Jackson* v. *Spittall* (4); and I do so because it appears to me to be in accordance with the true meaning of the words used by the legislature, and because it is in furtherance of the object which the legislature had in view in framing the section. The 18th section permits the service of the writ abroad whenever the cause of action arises within the jurisdiction or there is a breach without the jurisdiction of a contract made within it. The state of facts on which the question arises here is, that a promise of marriage was made between two persons residing respectively at the Cape of Good Hope and at Calcutta, which promise was to be performed in England; or, if not, it was at any rate to be performed in a reasonable time, and that reasonable time elapsed and the time for performance arrived, and the refusal to perform, which constitutes the breach, took place when both parties were in England. What, then, did the legislature mean when it spoke of the cause of action arising in England? Did it mean what has been termed the whole cause of action; that is, both the contract and the breach? I think that is not the true construction. I understand by cause of action that which creates the necessity for bringing the action. No doubt, to make the act or omission complained of a cause of action, a contract must have preceded, but so also a negotiation must have preceded the making of the contract; yet I should not include in the expression *cause of action* that negotiation, nor any of the other circumstances that might form part of the necessary evidence in the cause as the groundwork of the cause of complaint, but only the cause of complaint itself, that is, the breach. That this was the intention of the legislature, I think, appears from the alternative case put in the section, which allows of redress being obtained in England for a breach of a contract which was made here, although the breach may have taken place abroad. In this latter case it is evident the legislature did not consider it necessary that the whole cause of action should arise here; and I infer that it intended to give a remedy here equally in the corresponding case; that when, for instance, a man contracts in China to deliver goods in England, and by failing to deliver them here creates a breach of contract and a cause of action here, there should be redress in the English courts as much as when a contract is made in England and broken in China.

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(1) Law Rep. 3 Q. B. 340.

(2) 3 H. & C. 865; 34 L. J. (Ex.) 186. 11 Jur N S 538

(3) 6 W. R. 282.

(4) Law Rep. 5 C. P. 542.

(5) 2 H. & C. 954; 33 L. J. (Ex.) 179, 180. 10 Jur N S. 107.

I cannot, therefore, take any other view than that adopted by the Court of Common Pleas; and I think we are not justified in introducing into the section a word not found there, and saying that when the legislature says *cause of action* it means *whole cause of action*, and not that which the words used naturally express, namely, the fact which gives rise to the action.

MARTIN, B. I am also of opinion that this writ was rightly issued. The statute says that the proceedings it describes may be taken whenever there is a cause of action arising within the jurisdiction or in respect of a breach without the jurisdiction of a contract made within the jurisdiction. Now, here the contract was made without the jurisdiction; but a contract of marriage constitutes a continuing relation between the parties, by which

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they remain mutually bound to one another until the obligation is in some way dissolved. While the parties were under this obligation, both came to England, and in England the defendant wrote to the plaintiff a letter which would be evidence of a breach, the breach itself being the non-performance of the contract within a reasonable time. When the reasonable time for performance elapsed, and the defendant refused to fulfil his obligation, a cause of action did, within the meaning of the statute, arise, and it arose in England, because that is the place where the parties were when the breach took place. We were pressed with the case of *Sichel* v. *Borch* (1), but I think that decision not inconsistent with the judgment I am now pronouncing, and I adhere to it. There a bill was drawn in Norway, and was indorsed there, but, being drawn on a merchant in London, it was sent over here for payment, was presented in London by a person who became entitled to it by indorsement, and was dishonoured. It was contended that the dishonour of the bill was a cause of action arising in England; but I thought that a reasonable construction must be given to the Act, and I held, and still hold, that the Act was never intended to embrace cases of that kind, or to make a foreign merchant liable to be sued here, whose only connection with England is that he has drawn a bill upon this country, where he has perhaps neither establishment nor agency. The Court of Queen's Bench has assented to that judgment, after consideration, in the recent case of *Allhusen* v. *Malgarejo* (2), and I think we ought not to depart from it.

KELLY, C.B. I entirely concur in the regret expressed by my Brother Pigott, that a difference of opinion should prevail in the court on a matter of daily practice, but I find it impossible to concur in the view entertained by the rest of the Court. The difficulty, however, which arises from the ambiguity of the terms used in the Act, must be met according to the best of our individual judgment, assisted by such authority as can be found upon the subject. In *Allhusen* v. *Malgarejo* (2) the Queen's Bench, following the rule laid down in this court in *Sichel* v. *Borch* (1), has held that by cause of action in 15 & 16 Vict. c. 76, s. 18, the legislature meant *whole*

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(1) 2 H. & C. 954; 33 L. J. (Ex.) 179. (2) Law Rep. 3 Q. B. 340.

10 Jun N.S. 107

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cause of action, and not merely the act which constitutes the breach. Quite independently of authority, that is the construction I should have placed upon the words. If, as is required by the opposite construction, the words *cause of action* are to be read as equivalent to the words "breach of contract," I can see no reason why, inasmuch as the latter words are used in the second branch of the alternative, they should not also have been adopted in the first, instead of the ambiguous phrase, *cause of action*. But, further, it appears to me contrary to the plain and ordinary meaning of the terms, to say that the act, which merely completes the cause of action, is the cause of action. Of itself, the act or omission, the non-payment, non-acceptance, or non-delivery, does not constitute a cause of action; what makes it such, that without which it would have no legal quality at all, is the contract that the person whose default is complained of, should pay, accept, or deliver. To make up a cause of action, therefore, it is necessary to import the preceding contract; and the cause of action can only be said to arise where both parts of it take place. That is the construction I put on the words of the Act; and I see no reason to alter these words for the purpose of giving them an operation which I do not believe to have been intended. The section acts beneficially to prevent the evasion of the payment of just debts, or of the performance of obligations contracted here, by keeping out of the reach of service; but it would be productive of great injustice if it were made applicable to the case of a foreigner residing at a distance, without knowledge of the process of our courts, or of the persons to whom he should resort for advice, and without any connection whatever with this country except that a breach has occurred here of a contract made by him in his own country. The facts in the case of *Sichel* v. *Borch* (1), which is now questioned, illustrate the practical inconvenience and injustice which would result from the contrary decision. In that case a Norwegian merchant, resident in Norway, drew there a bill which he indorsed to a firm in London; if he had indorsed it to a Norwegian in Norway, and it had by subsequent indorsement become vested in an indorsee in London, the case would, according to the view contended for, have been the same; and in such a case there would be a contract wholly completed in

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179. /10 Jur NS 607

Norway between parties resident there. Now, if a person resident in England chooses to take such a bill from abroad, there is no injustice in saying that he ought to sue in the country where the contract was made; but there would be a great injustice and inconvenience if he should be entitled to sue here the maker of the bill, and if the latter should be liable to be served with process, and should be compelled to instruct an attorney in England, where perhaps he has no connections and no funds. The contract is by the ordinary rules of international law to be regulated by the law of the country where it is made; but, according to this view, the matter is to be judged and determined, not in that country whose law is to be administered, but in this country, where that law is unknown, only by reason of the plaintiff's being entitled to require performance here.

In my opinion, therefore, the meaning of the words, as well as the intention of the Act, is that a remedy should be afforded in England in respect of contracts made here, whether the breach takes place in England or abroad; but that it was never designed to extend the remedy to the case of contracts made abroad, and only broken here; and that, if that had been the intention, it would have been, as it easily might be, expressed in clear and distinct terms.

I therefore entirely adhere to the judgment of this Court in *Sichel* v. *Borch* (1), confirmed as it is by the case of *Allhusen* v. *Malgarejo* (2) in the Court of Queen's Bench; and I cannot concur in the point of view taken by my Brother Martin, according to which the present case would not fall within the principle there laid down, by reason of the contract here being a contract continuing until breach, and, therefore, subsisting between the two parties whilst both were in England.

I have perused the judgment of the Court of Common Pleas in *Jackson* v. *Spittall* (3), and although I recognise the inconvenience there dwelt upon, which may in some cases be caused by the want of a remedy in this country, yet the rule which we are to act upon is a general one, and the balance, both of justice and expediency, appear to me to incline strongly to the opposite side.

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179. 10 Jur NS 107

(2) Law Rep. 3 Q. B. 340.

(3) Law Rep. 5 C. P. 542.

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Cleasby, B. I agree in discharging this rule. The difficulty appears to me to arise altogether from departing from the words used in the Act. If I read them as they stand, I think they are intelligible; but if I introduce another word, and for *cause of action* say *whole cause of action,* I can no longer understand them. Does it include every act of every description which concurs to make the cause of action, or only some portion of those acts, and if so, what portion? I cannot say. The whole cause of action, if it has any meaning, includes everything necessary to the cause of action, and must include the negotiation as well as the contract.

Now the cause of action must have reference to some time as well as to some place; does then the consideration of the time when the cause of action arises, give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises, determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. I cannot avoid the conclusion that a cause of action arises where that takes place which first makes a cause of action; the contract does not make a cause of action; but a cause of action does arise when and where the person who has entered into the contract does or omits to do that which gives a cause of action. But the whole cause of action in the sense which makes it include both the contract and the breach, arises nowhere. I agree with my Lord in thinking that some inconvenient consequences may arise from our so holding; but, on the other hand, if a man enters into a contract which is to be performed in England, he by his own act subjects himself to the difficulty, and can scarcely complain if he is sued for his default in the place where he has said performance shall be made.

If I could otherwise have hesitated in coming to this conclusion, the argument in the judgment of the Court of Common Pleas in *Jackson* v. *Spittall* (1) appears to me quite unanswerable. In substance it is this: when the section speaks of a cause of action arising within the jurisdiction, and then goes on to say, "or in respect of the breach of a contract made within the jurisdiction," it must be taken in the second alternative to repeat the words "cause of action," and would if it were expanded, run thus: "or a cause of action in respect of the breach of a contract made within the jurisdiction." That being so, it is plain that in this branch of the alternative, the words *cause of action* cannot mean *whole cause of action,* because, by the assumption, the contract is made within the jurisdiction, and the breach takes place without the jurisdiction. It means the breach of contract out of which the action arises. If so, then it means the same in the first branch of the alternative; and the only difference is, that here it is immaterial to consider where the broken contract was made, or where the right, whatever its nature, was acquired, which has been infringed; it is sufficient if the injurious act or omission took place here; whereas in the second alternative, where the breach takes place abroad, it is only contracts made here that are protected by the section.

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(1) Law Rep. 5 C. P. at pp. 551, 552.

Rule discharged.

Attorneys for plaintiff: *Dale & Stretton.*
Attorneys for defendant: *Stocken & Jupp.*

[IN THE EXCHEQUER CHAMBER.]

Dec. 2.

THE SOUTHAMPTON STEAM COLLIERY COMPANY *v.* CLARKE.

Charterparty—Full and Complete Cargo—Freight—"Baltic" printed Rates—Cargo of "Oats or other lawful Merchandise."

By a charterparty the defendant, the charterer, undertook to load at Archangel "a full and complete cargo of oats or other lawful merchandise," and the plaintiffs, the shipowners, to deliver the same on being paid freight as follows: "4*s.* 6*d.* sterling per 320 lbs. weight delivered for oats; and if any other cargo be shipped, in full and fair proportion thereto, according to the London Baltic printed rates."

The defendant put on board at Archangel a full and complete cargo of flax, tow, and codilla, being three of the articles mentioned in the Baltic printed rates, and paid to the plaintiffs the freight earned by the goods thus shipped according to a scale derived from the tables which constitute the Baltic rates. The plaintiffs claimed, in addition, the difference between this amount and the larger amount which would have been earned by a full and complete cargo of oats:—

Held (affirming the judgment of the Court below), that flax, tow, and codilla

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being "lawful merchandise" within the meaning of the charterparty, the defendant had fulfilled his contract by loading a full and complete cargo of those articles, and, therefore, was not, on the true construction of the charterparty, liable for the additional freight claimed by the plaintiffs as upon a full cargo of oats.

APPEAL by the plaintiffs from a decision of the Court of Exchequer, discharging a rule to enter a verdict for them. (1)

June 27. The case was argued by

Manisty, Q.C. (*Cohen* with him), for the plaintiffs; and by *Field, Q.C.* (*Gadsden* with him), for the defendant.

The following authorities, in addition to those referred to in the Court below, were cited during the argument: *Cockburn* v. *Alexander* (2); *Irving* v. *Clegg* (3); *Cole* v. *Meek* (4); *Moorsom* v. *Page* (5); *Russian Steam Navigation Co.* v. *Silva.* (6)

Cur. adv. vult.

Dec. 2. The judgment of the Court (Willes, Keating, Blackburn, Mellor, and Montague Smith, JJ.) was delivered by

BLACKBURN, J. This is an appeal from the judgment of the Court of Exchequer in discharging a rule to set aside the verdict found for the defendant.

The case was argued in last sittings before my Brothers Willes, Keating, Mellor, Montague Smith, and myself, when the Court took time to consider. The Chief Justice of the Queen's Bench, who only heard a small part of the argument, is not a party to this judgment.

The whole question depends on the construction of a charterparty, the material parts of which were that the plaintiffs' ship was to proceed to Archangel, "and there load from the factors of the said merchant (the defendant) a full and complete cargo of oats *or other lawful merchandise*, to be brought to and taken from alongside free of risk and expense to the ship, and not exceeding what she can reasonably store and carry," and, being so loaded, should deliver the same at her port of destination "on being paid

(1) Reported Law Rep. 4 Ex. 73, where the facts are fully stated.

(2) 6 C. B. 791.

(3) 1 Bing. N. C. 53.

(4) 15 C. B. (N.S.) 795; 33 L. J. (C. P.) 183.

(5) 4 Camp. 103.

(6) 13 C. B. (N.S.) 610.

freight as follows: 4*s.* 6*d.* (say four shillings and sixpence sterling) per 320 lbs. English weight delivered for oats, and if any other cargo be shipped to pay *in full and fair proportion thereto* according to the London Baltic printed rates, taking as a basis for natural weight of the oats 36 lbs. (English) per bushel. . . . The freight to be paid on unloading and right delivery."

Copies of the London Baltic printed rates form part of the case on appeal. They fix the proportions of the freight of a great many articles; so that the freight of one of those enumerated articles being ascertained, it only requires the working out of a sum in proportion to ascertain the freight of any other of the enumerated articles. The part of the tables referring to the freight of codilla, flax, and oats are as follows: "codilla" is to pay one-half more than the freight of clean hemp; "flax, in all cases, the same freight as hemp;" and under the head of "grain" it is provided thus:—"Wheat, ninety-seven imperial quarters equal to ten tons of clean hemp; oats to pay 22½ per cent. less than the freight of wheat."

When, therefore, the freight for a quarter of oats is ascertained, that for a quarter of wheat is to bear to it the proportion which 1000 bears to 775, so that the rate for a quarter of wheat in proportion to any fixed rate for a quarter of oats can be worked out.

The following figures, if the sums are correctly worked out, would be the proportions in the present case: If a bushel of oats weighs 36 lbs., a quarter of oats must weigh 288 lbs.; and, consequently, if 320 lbs. pay 4*s.* 6*d.*, a quarter must pay 4*s.* and six tenths of a penny. Taking this as the rate for oats, a quarter of wheat must pay a fraction more than 5*s.* 2½*d.* The rate for a quarter of wheat being fixed, that for a ton of hemp or of flax is to bear the proportion to it which ninety-seven bears to ten, which, at the above rate for wheat, makes very nearly 2*l.* 10*s.* 8¼*d.* for a ton of hemp or flax; and as codilla is to pay one-half more, the freight for codilla on the same calculation is very nearly 3*l.* 16*s.*

The first question that arises is, what is the true construction of the charterparty? Mr. Manisty, for the appellants, contended that the words, "if any other cargo be shipped to pay in full and fair proportion thereto," mean that the amount of freight payable for the other articles which constitute that other cargo should be

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so fixed that the aggregate freight for the whole bulk of that other cargo should equal that which would have been payable for a cargo of oats, and that the reference to the London Baltic printed rates is only for the purpose of fixing the relative rates of those other articles between themselves.

This construction would render it necessary after the whole cargo was supplied to go through a most elaborate calculation in order to ascertain what sum was to be inserted in the bill of lading for each article, as the freight to be paid on the delivery of that article.

But we do not think that this is the true construction of the charterparty. We think it is merely a mode of writing shortly that the freight for each article mentioned in the London Baltic printed rates shall be that which on working out the sum in proportion would be the rate for that article when oats were at the specified rates. Taking this view (and assuming the figures above worked out to be correct) the charterparty has the same effect as if it had been expressed thus, "and if any other cargo be shipped, to pay for wheat 5*s.* 2½*d.* per quarter, for hemp or flax 2*l.* 10*s.* 8¼*d.* per ton, for codilla or tow 3*l.* 16*s.* per ton," and so on, inserting the proportionate rate for each of the articles enumerated in the printed Baltic rates. And this is the construction which was put upon the bill of lading in *Russia Steam Navigation Company* v. *Silva* (1), where evidence of usage was received; but my Brother Willes expresses an opinion, in which we concur, that the construction would have been the same without any evidence. This also is the construction put upon the charterparty in the court below, and we think it correct. The freight, therefore, for the cargo actually carried, consisting of 30 tons of flax, 4 tons of codilla, and 134 tons of tow, would, at the above figures, amount respectively to 76*l.* 0*s.* 7½*d.*, 15*l.* 4*s.*, and 509*l.* 4*s.*, or in all, 600*l.* 8*s.* 7½*d.* In the case the figures arrived at by the calculations are stated differently, and amount to 602*l.* 0*s.* 6*d.* As the larger sum has been paid, it is not necessary to inquire where the error lies.

As the articles actually carried are all provided for by the printed rates and the custom of trade, which reckons tow as codilla, it is unnecessary to express any opinion as to what would have been the case if articles not so provided for had been offered as lawful merchandise. But another question was raised on the appeal on which there is more difficulty.

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(1) 13 C. B. (N.S.) 610.

The articles tendered for cargo were of so slight a specific gravity that the ship was obliged to ship an unusually large proportion of ballast, so that she carried only 168 tons of cargo to 120 tons of ballast, and the freight earned was in consequence not very much more than one-half of that which would have been carried if the cargo had consisted of oats. If, therefore, the shipper has a right under such a charterparty to supply any of the enumerated articles in such proportions as suits his own convenience, without any regard to the interest of the shipowner, the defendant has pushed his right to an extreme, and we should be glad to find that there was something to prevent his doing so. But we can find nothing to enable us to do so.

The general rule in construing a contract which gives an alternative is, that the party who is to do the first act, which cannot be done without determining which it shall be, shall have the election: see Com. Dig. Tit. Election A. And applying this rule where there is a contract that the shipper shall supply a full cargo, consisting of one or more of several articles; the shipper has the right to elect which of those articles he will supply. And when a full cargo is supplied it is (in the absence of any stipulation express or implied to the contrary) the shipowners' duty to procure what ballast he may require for that cargo: *Towse* v. *Henderson.* (1) It seems clear that if the only articles specified in the charterparty had been those which the shipper, having an alternative, chose to supply, the shipowner must have furnished the large proportion of ballast gratis.

It might have been prudent for the shipowner to protect himself against an extreme use of this privilege, by stipulating that the freight should not be less than some fixed sum, if the freighter would have assented to such a stipulation; but as we have already said, we cannot assent to the argument that such a stipulation is expressed by the words, "in full and fair proportion." It might also have been prudent to insert a stipulation that the shipowner should not be bound to supply more ballast than bore a reasonable proportion to the cargo shipped, say, for example, one ton of ballast to ten of cargo, and should be paid dead freight for the excess of

(1) 4 Ex. 890.

ballast, and a custom to that effect would not be unreasonable. But there is no such stipulation, and the jury found that there is no such custom. (1)

The only remaining question is, whether any such qualification is implied by law. There is no authority for saying that such a qualification is implied by law. *Moorsom* v. *Page* (2) is a direct authority to the contrary. That was, it is true, only a nisi prius decision, but it was followed in *Irving* v. *Clegg* (3), and approved of in *Cole* v. *Meek* (4), though the Court there thought that on the construction of the charterparty before them there was a stipulation to supply broken stowage. Fifty-six years have elapsed since *Moorsom* v. *Page* (2) was decided, and we cannot find that during all that time it has ever been questioned, and it may be worth noticing that in the Baltic printed rates there is an express provision that the rate of freight for mats from Archangel shall only be where they do not exceed one-sixth of the ship's cargo, which seems a stipulation inserted for the very purpose of guarding against the abuse of the power known by the merchants to exist. It is so important that the law should be fixed, and that mercantile men should know what their documents will be held to mean when construed in a court of law, that we should be slow to overrule a case so long acted upon, even if we thought that if it was res integra we should have decided the other way. But thinking, as we do, that the case was rightly decided, we must hold that in the absence of any stipulations, express or implied, to the contrary, the shipper may supply a full cargo of any one or more of the articles enumerated in the charterparty, and that the shipowner must protect himself against any hardship that may arise from an extreme use of this privilege, by a stipulation on his part.

We think, therefore, that the judgment below was right, and should be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Westall & Roberts.*

Attorney for defendant: *J. Cooper.*

(1) Law Rep. 4 Ex. at p. 75.

(2) 4 Camp. 103.

(3) 1 Bing. N. C. 53.

(4) 15 C. B. (N.S.) 795; 33 L. J. (C.P.) 183.

BAIN AND OTHERS *v.* FOTHERGILL AND OTHERS.

1870
Nov. 15.

8 Ch 263, 275, 10 CP. 548

Vendor and Purchaser—Sale of Residue of a Lease—Equitable Interest in Agreement for Lease—Defect of Title—Measure of Damages for Breach of Contract by Vendor.

The executors of H. having an agreement for a twenty-one years' lease of an iron ore royalty, contracted to assign their interest in the term to the defendants. In order to perfect the assignment, the consent in writing of the lessors was, under the terms of the agreement, necessary. The lessors were at the time of the contract willing to consent conditionally on the defendants signing a duplicate form of consent, whereby it was provided that no further assignment should take place without a fresh consent. Before the defendants had fulfilled this condition, and without the consent of the lessors to the assignment to the defendants having been obtained, and without any fresh consent from them to another assignment of the term, the defendants contracted to assign their interest in the royalty to the plaintiffs. At the time of their entering into this contract they knew that the consent of the lessors to the assignment to third parties was necessary, but no mention of the necessity of such consent was then made to the plaintiffs. The defendants afterwards fulfilled the condition upon which the lessors had originally been willing to consent to the assignment to them, but the lessors had meanwhile withdrawn their consent, and although the defendants used all reasonable means they failed to obtain the lessors' consent either to the assignment from the executors of H. to them or to the assignment from them to the plaintiffs. They were, therefore, unable to carry out their contract with the plaintiffs, who brought this action to recover the deposit money which they had actually paid, the expenses incidental to the investigation of the defendants' title, and also damages for the loss of their bargain:—

Held, that the case was within the principle of *Flureau* v. *Thornhill* (2 W. Bl. 1078), and that the plaintiffs were only entitled to recover their deposit money and the expenses incidental to the investigation of the defendants' title.

Affirmed in H of L. LR 7 HL. 158

SPECIAL case.

The plaintiffs carry on business as ironmasters at Harrington, in the county of Cumberland, under the name of Bain, Blair, & Paterson.

The defendants, under the name of the Plymouth Iron Company, carry on ironworks in Wales, and amongst others, several of those which formerly belonged to a certain Mr. Anthony Hill, now deceased. Anthony Hill was possessed of numerous ironworks and of extensive iron ore mines under several unexpired leases or agreements for leases, and amongst others, he was possessed of a Miss Watter's royalty, consisting of the iron ore mines under a property called Crossfield, at Cleaton, in the county of Cumberland, by virtue of an agreement dated the 19th of October, 1861, for a lease for the term of twenty-one years, to be computed from the 20th of March, 1860. That agreement contained a clause providing against the assignment or subletting of the premises thereby agreed to be demised without the consent of the lessors in writing being first obtained.

Mr. Hill died on the 2nd of August, 1862. In August, 1863, his executors entered into a contract with the defendants for the sale to them of all the above-mentioned ironworks and mines of Anthony Hill, including his interest in Miss Watter's royalty, for the sum of 250,000*l.*, but the purchase had not been completed on the 17th of October, 1867. In order to enable them to carry out the assignment to the defendants of their testator's interest in Miss Watter's royalty the executors applied to the lessors for their consent to such assignment. The lessors were willing to give such consent, provided the defendants would execute a duplicate of it. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors and retained in the hands of their solicitor. The other part was sent on the 15th of June, 1865, to the solicitors acting for the executors, who immediately sent it to the defendants' solicitors for execution by the defendants. The consent was limited to the assignment from Hill's executors to the defendants, and provided that nothing therein contained should authorize the defendants to assign any part of the premises comprised in the agreement of the 19th of October, 1861, without the previous consent in writing of the lessors.

On two or three occasions subsequently to the month of June, 1865, the solicitor for the lessors requested the solicitors of the executors to obtain the execution by the defendants of this duplicate consent or licence, and about the 11th of October, 1865, intimated that the lessors would withdraw their consent unless the duplicate was returned executed in a few days. This intimation was communicated on that day to the solicitors of the defendants; but, notwithstanding, the duplicate consent remained in the hands of the defendants' solicitors unexecuted at the time when the agreement now in question of the 17th of October, 1867, was entered into.

Miss Watter's royalty formed a small item amongst the large properties called the Plymouth Ironworks, comprised in the contract of August, 1863. Numerous abstracts of title were at various times delivered to the defendants' solicitors in respect of the several properties, and questions arose upon some of them which were the subject of negotiation between the defendants' solicitors and the solicitors of the executors, and were not finally settled until October, 1868, when the purchase of all the properties comprised in the contract of August, 1863, was completed. Except upon the question of the licence to assign no difficulty arose as to the title to Miss Watter's royalty, though its conveyance to the defendants was delayed by the investigation of title of other portions of the property.

On the 17th of October, 1867, Mr. Paterson, one of the plaintiffs, had an interview with the defendant Fothergill with the view of purchasing the defendants' interest in Miss Watter's royalty. The terms were discussed between them, and an agreement was written out by Mr. Fothergill and signed by both parties in these terms:—

"Plymouth Ironworks, near Merthyr Tydvil,
"Messrs. Bain, Blair, & Paterson, "October 17, 1867.

"Gentlemen,—We offer to sell you our interest in Miss Watter's royalty in Cumberland upon the following terms, namely, 2500*l.* to be paid us in cash on our handing you a transfer of the said royalty [here followed other terms, which it is unnecessary to state in detail.] A deposit of 250*l.* to be made us forthwith, and the which arrangement to be carried out and accomplished as soon as may be. The usual covenants for our protection as standing between you and our lessors to be made by you.

(Signed) "Richard Fothergill,
"For the Plymouth Iron Co. and Self.

"We accept of offer on terms stated.

"Bain, Blair, & Paterson,
"p. John Paterson."

The agreed deposit of 250*l.* was then paid by Mr. Paterson to Mr. Fothergill, and a receipt was written at the foot of the agreement, and signed by Mr. Fothergill.

Before acceding to the terms set forth in the above agreement, and before those terms were reduced into writing, Mr. Paterson asked for time to consult his partners, but Mr. Fothergill said he never left offers open, and that Mr. Paterson must decide it at once. The bargain was thereupon concluded.

Before the 17th of October, 1867, Mr. Fothergill had been informed that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the defendants' interest in the royalty, but at the meeting with Mr. Paterson no mention was made by him of the necessity for such consent. Either it did not cross his mind, or if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise in respect to it, and that the matter was therefore one of no importance. In mining leases in Cumberland it is usual to provide against transfer or subletting without the consent or licence of the lessor, but Mr. Paterson was not actually informed of the necessity in the present case until, on his return to Cumberland a few days after his interview with Mr. Fothergill, he learned it from a person who had himself been in treaty with the defendants for the royalty. On the 24th of October Mr. Paterson saw the agent of the lessors, who told him there was still a consent to be signed by the defendants in relation to the transfer from Hill's executors to them; and on the following day the plaintiffs accordingly wrote a letter to Mr. Fothergill asking him to do what was necessary to give the plaintiffs early possession. Shortly after the receipt of this letter the defendant Fothergill wrote to the lessors' agent, informing him of the disposition of the defendants' interest, and requesting him to facilitate the transfer to the plaintiffs.

After some further correspondence and negotiations, both by the plaintiffs and Mr. Fothergill with the lessors' agent, which proved ineffectual, Mr. Fothergill on the 16th of November, 1867, wrote to the plaintiffs a letter in the following terms, proposing to cancel the contract: "A condition exists, of which I certainly knew nothing, exacting a consent which I have no means of obtaining, and which I am advised is absolutely essential to action, and which consent both you and I have tried in vain to obtain. Is it not, therefore, better to abandon an arrangement which we cannot carry through?"

The defendants' solicitors had not, prior to the 17th of October, 1867, mentioned to the defendants the subject of the first consent of the lessors being necessary; and, in fact, the application by the executors' solicitors in 1865 to procure the signature of the defendants to the consent was considered by the defendants' solicitors premature, it being then uncertain whether the title to the Plymouth Ironworks, which was the principal part of the property purchased, could be perfected. The consent of the lessors for the assignment to the defendants was withdrawn by the lessors on the 6th of January, 1868.

In May, 1868, the title to the Plymouth Ironworks having then been satisfactorily shewn, the duplicate consent of the 15th of June, 1865, was executed by the defendants, and sent to the solicitors for Hill's executors. On the 25th of June following, the consent so signed by the defendants was tendered to the solicitor for the lessors in order to be exchanged for the consent executed by the lessors, but their consent having been withdrawn, the form which they had executed was no longer in the hands of their solicitor, and from thenceforward their agent absolutely declined to consent to an assignment to the defendants, unless the defendants would enter into an agreement with another person named Stirling for the sale to him of their interest in Miss Watter's royalty, which they ultimately did. The plaintiffs, who were not aware of this sale, still continued to insist on the performance by the defendants of the original agreement, until on the 24th of November, 1868, they received a letter from the defendants enclosing a cheque for £250, the amount of deposit money paid by them. The plaintiffs returned the cheque, and commenced this action to recover damages for the loss of their bargain.

The defendants paid into court a sum sufficient to cover the deposit, and interest, and the expenses incurred by the plaintiffs with reference to the carrying out of the agreement.

The question for the opinion of the Court, who were to draw inferences of fact, was, whether the plaintiffs were entitled to recover any damages beyond the sum paid into court. If the Court should be of opinion in the affirmative, judgment to be entered for the plaintiffs for a sum to be assessed by an arbitrator; if in the negative, judgment to be entered for the defendants.

1870

BAIN v. FOTHERGILL.

Quain, Q.C. (*Herschell* with him), for the plaintiffs. This case is governed by *Hopkins* v. *Grazebrook* (1), and not by *Flureau* v. *Thornhill.* (2) The defendants were guilty of a double default. They were aware that to complete their own title an assent in writing by the lessors to the assignment from Hill's executors to them was necessary, but through their own carelessness they failed to get it. Then, not having obtained it, they assumed to contract to assign their interest, which was, in fact, no interest, to the plaintiffs. They could not assign it without a fresh assent to the assignment, and that second assent they were not in a position to ask for, never having completed their own title. Where a vendor is in possession, and bonâ fide believes that he has a good title, he is within the rule in *Flureau* v. *Thornhill* (2), and, if it turns out that his title is not "marketable," he is only liable to repay the deposit money and expenses paid by the purchaser. But here damages for loss of bargain are recoverable, for the defendants knew they had not what they professed to sell. They undertook to sell that of which they themselves had not secured the command: *Robinson* v. *Harman* (3); *Engel* v. *Fitch* (4); *Lock* v. *Furze.* (5)

[CLEASBY, B. The defendants here did not agree to sell the property, but only their interest in the property, whatever it might be.]

That interest could not be anything but the residue of a lease; but, in fact, they had no such residue to sell.

[CHANNELL, B. In *Hopkins* v. *Grazebrook* (1) there was an express contract to make a good title by a day certain. There is nothing equivalent in this case.]

There is here a contract by persons who profess to be the owners, and are not in possession, to legally assign the residue of a term at a time when two assents by the lessors, both of which were necessary, have not been obtained. It may be conceded that the defendants may have thought there would be no difficulty in getting them. But a man without an actual "holding" title, who sells with a mere bonâ fide expectation of being able to complete his bargain, is not within *Flureau* v. *Thornhill.* (2)

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(1) 6 B. & C. 31.

(2) 2 W. Bl. 1078.

(3) 1 Ex. 850.

(4) Law Rep. 3 Q. B. 314; 4 Q. B. 659.

(5) Law Rep. 1 C. P. 441.

[CLEASBY, B. Two consents would not be necessary. The lessors might have consented to an assignment direct from Hill's executors to the plaintiffs.]

There would have been insuperable difficulties in such a course being adopted. The conditions of the assignment from the executors to the defendants and from them to the plaintiffs were altogether different. Under these circumstances, the defendants are liable for substantial damages. *Flureau* v. *Thornhill* (1), which introduces an exception to the ordinary rule of assessment of damages, ought to be strictly limited to cases of "defect in title," i.e., to the cases where a vendor being the owner or in possession of property with a good "holding" title, fails to satisfy the purchaser that it is marketable. It has no application where a vendor is absolutely in default, and contracts to sell what he has not. *Walker* v. *Moore* (2) is distinguishable. There the vendor was only held liable for actual expenses incurred by the purchaser, but he was in possession of the property he professed to sell.

Manisty, Q.C. (*Holker, Q.C.*, and *J. R. Mellor* with him), for the defendants. This case is entirely different from *Hopkins* v. *Grazebrook* (3), where the ratio decidendi was, that there had been an express undertaking by the defendant to make a good title at a time when he knew he could not do it, and had no reason to suppose he ever would be able to do it. So in *Robinson* v. *Harman* (4) there was a breach of an express covenant for quiet enjoyment. But here there is merely a contract to assign an interest in the residue of a term which the defendants had reasonable grounds for supposing they would be able to assign in due legal form. The case is similar to *Sikes* v. *Wild* (5) and to *Pounsett* v. *Fuller*. (6) The defendants eventually failed, though they did all they could. They were in no default, and their failure was caused by what was in the strictest sense a defect in title within the meaning of *Flureau* v. *Thornhill.* (1)

Quain, Q.C., in reply.

MARTIN, B. I think the defendants are entitled to our judgment.

(1) 2 W. Bl. 1078.

(2) 10 B. & C. 416.

(3) 6 B. & C. 31.

(4) 1 Ex. 850.

(5) 4 B. & S. 421; 32 L. J. (Q.B.) 375.

(6) 17 C. B. 660; 25 L. J. (C.P.) 145.

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A fixed rule in cases such as these is very desirable, and we find such a rule in *Flureau* v. *Thornhill* (1), laid down more than a hundred years ago, and as binding upon us, in my opinion, as any positive statutory enactment. The same rule is enunciated clearly in Sedgwick on Damages, 4th ed. p. 234, where the author says, after referring to the general rule governing the assessment of damages: "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter, he is entitled to damages resulting from the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." Now here there is no suggestion of bad faith, and according to the practice thus laid down for our guidance, a practice which is derived from *Flureau* v. *Thornhill* (1), all that can be recovered where a bargain for the sale of property goes off from a defect in the vendor's title is the deposit money, with any other expenses incidental to the initial stage of the contract. And the first sentence of Mr. Justice Blackstone's judgment in that case shews very plainly why this rule ought to be adopted. It is because the sale is not absolute, but conditional upon its being found that the vendor has a good title. The vendor does not absolutely warrant the title, but he must act with bona fidés in the matter. The law, therefore, touching these cases has thus been laid down, and we must act accordingly.

But then it is contended that the present case is governed by *Hopkins* v. *Grazebrook* (2), and not by *Flureau* v. *Thornhill*. (1) Now in *Hopkins* v. *Grazebrook* (2), there were circumstances which were held to take the case out of the rule of *Flureau* v. *Thornhill* (1), and I by no means say the decision was wrong. It is quite clear, however, from the judgment that Lord Tenterden disapproved of

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(1) 2 W. Bl. 1078.

(2) 6 B. & C. 31.

Flureau v. *Thornhill* (1), but his views have not been followed in subsequent cases. The doctrine of *Hopkins* v. *Grazebrook* (2), therefore, ought not to be extended. The true rule is laid down in *Engel* v. *Fitch* (3), and seems to me to include the present case. It may perhaps be wrong in principle, but we are bound by it, and apply it to the facts before us, to which I now proceed to advert.

It appears that the executors of one Anthony Hill were possessed of an agreement for a twenty-one years' lease of an iron ore royalty at Crossfield. There was in the agreement a proviso that a lease should be forthwith prepared. The lessees could not assign the demised premises without the consent in writing of the lessors. In August, 1863, the lessees contracted to assign the residue of the term to the defendants, who thus became interested in the agreement for a lease belonging to Hill's executors. This was, it appears to me, an equitable interest, and this, and this only, was sold to the defendants. They became entitled, in equity, on the sale, to have the agreement performed, subject to the lessors' right to object to them as assignees. The consent in writing required to the assignment was never in fact obtained, and, without having obtained it, the defendants on the 17th October, 1867, agreed to sell their interest in the agreement, and it might perhaps be contended that what the defendants really sold was the interest they had, and that if they were willing to convey that, whatever it was, their contract was performed. This point, however, is not relied on by the defendants, for it is admitted that they did not perform their contract, and that the plaintiffs can recover back the deposit they paid, and the expenses, if any, they incurred. As to any further damages being recovered, we must remember that the defendants, though it may be careless and forgetful, acted with unquestionable bona fides. As in *Flureau* v. *Thornhill* (1), the defendants were willing to complete their contract, and only failed because they failed to get the consent which they might reasonably have supposed there would be no difficulty in getting. Under these circumstances, I think the rule in *Flureau* v. *Thornhill* (1), as explained by the judgment of the Court of Exchequer Chamber in *Engel* v. *Fitch* (3), governs this case. I do not think

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(1) 2 W. Bl. 1078.

(2) 6 B. & C. 31.

(3) Law Rep. 4 Q. B. 659.

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it necessary to go through the other cases referred to in detail. Nor do I wish it to be supposed that I consider *Hopkins* v. *Grazebrook* (1) to be wrongly decided. That case may have been rightly decided, but the decision rests upon its own exceptional circumstances.

CHANNELL, B. I also think that the defendants are entitled to judgment. The rule in *Flureau* v. *Thornhill* (2) is anomalous and exceptional to the general rule of law as to the damages recoverable for breach of contract; it must therefore be carefully applied, as indeed it always has been. The case has never been overruled, but, whenever it has been discussed, the Courts have upheld it, and distinguished other cases from it. With regard to *Hopkins* v. *Grazebrook* (1), it is noticeable that the case was not fully considered, the rule having been refused. The judgment there delivered by Lord Tenterden deserves, as do all his judgments, the greatest respect, but it is plain that he was not satisfied with the decision in *Flureau* v. *Thornhill* (2), which, however, in spite of this expression of disapproval, has been acted upon ever since. Here the question is, whether, under the circumstances now before us, we are to be governed by *Flureau* v. *Thornhill* (2) or by *Hopkins* v. *Grazebrook*. (1) Now, in the latter case, the defendant had absolutely no estate, but only a contract for an estate. Nevertheless, he put up the estate for sale on or before a day named, a course which involved the necessity of making a good title by the day named. Lord St. Leonards, in his treatise on Vendors and Purchasers, 14th ed. p. 359, attaches importance to this fact, and it accounts, in my opinion, in some degree for the decision. Moreover, the circumstances there seem to shew conduct amounting to what the law would consider fraud on the defendant's part. Other cases have been referred to, which I need not enumerate, and especially two were cited for the defendants, *Pounsett* v. *Fuller* (3) and *Sikes* v. *Wild* (4), which seem to me strong authorities for them, and go to prove that the rule laid down in *Flureau* v. *Thornhill* (2) applies wherever fraud is not suggested. I think the facts stated in this special case clearly bring the defendants within that rule, and that they are therefore entitled to our judgment.

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(1) 6 B. & C. 31.

(2) 2 W. Bl. 1078.

(3) 17 C. B. 660; 25 L. J. (C.P.) 145.

(4) 4 B. & S. 421; 32 L. J. (Q.B.) 375.

CLEASBY, B. I am of the same opinion. I do not think this case is governed by *Hopkins* v. *Grazebrook.* (1) The agreement between the parties is contained in the letter of the 17th of October, containing the defendants' offer to sell their "interest in Miss Watters' royalty." But what was their interest? It appears that they had agreed to purchase a large mining property, including Miss Watters' royalty, but they had not actually purchased any legal interest whatever. There was only an agreement for a lease, with a stipulation that the lease should be prepared in due course. The defendants were, therefore, really dealing, not with actual property, but only with their interest in a contract relative to property. This is quite a different thing from the contract in *Hopkins* v. *Grazebrook* (1), where the defendant undertook to make a good title by a day certain. We are therefore thrown back on the rule of *Flureau* v. *Thornhill* (2), which establishes that, where there is no fraud, and no express contract to sell property with a knowledge on the vendor's part that he has not the title to sell, as was the case in *Hopkins* v. *Grazebrook* (1), no damages for loss of bargain can be recovered. Here the defendants merely contracted to sell their interest, and afterwards did everything they could to enable the plaintiffs to have the benefit of that contract. They do not seem to me to have been in any default such as to take them out of the rule in *Flureau* v. *Thornhill* (2), and render them liable to the damages claimed.

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Judgment for the defendants.

Attorneys for plaintiffs: *Helder & Kirkbank.*
Attorneys for defendants: *Thomas & Hollams.*

(1) 6 B. & C. 31. (2) 2 W. Bl. 1078.

END OF MICHAELMAS TERM, 1870.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXIV VICTORIA.

1871
Jan. 18.

MORGAN, Appellant; GRIFFITH, Respondent.

Evidence—Written Agreement—Parol Variation—Collateral Agreement.

13 Eq 14
Ch 764-5,
HL 357
Eq 176-7
0 Eq 446-7

The respondent agreed to hire of the appellant certain grass land on the terms of a lease which was to be signed at some future time. The respondent, having entered on the land, found it was overrun with rabbits, and, on the lease being presented to him for signature, declined to sign it unless the appellant would promise to destroy the rabbits. The appellant refused to put a term in the lease binding him to do so, but agreed by parol that he would destroy them. The respondent thereupon signed the lease, which provided, among other things, that the tenant should not shoot, hunt, or sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow the landlord or friends at any time to hunt, shoot, or sport on the land. Afterwards, the rabbits not having been destroyed by the appellant, the respondent sued him in the county court for the damage done by them to the grass and crops on the land demised. The judge on the trial admitted evidence of the parol agreement, and asked the jury to say whether it had been made, and whether the lease had been signed on the faith of it. They found for the respondent on both points. Upon appeal on the ground of the misreception of evidence:—

Held, that the parol agreement was collateral to the written lease, and that the evidence was properly admitted.

Appeal by defendant from the Northamptonshire County Court. This action was brought by William Griffith, plaintiff, to recover from George Morgan, defendant, compensation for damage done to the grass and crops of the plaintiff "in consequence of the breach by the defendant of his promise to keep down and destroy the rabbits on the land hired by the plaintiff of the defendant."

At the hearing of the cause the following facts were proved:—

The plaintiff, who is a farmer and cattle-dealer, agreed in the summer of 1867 to hire of the defendant some grass land from Michaelmas Day in that year on the terms of a lease which was to be signed at some future time. He entered on the land as tenant on the Michaelmas Day, and soon afterwards found the land overrun with rabbits, which did considerable damage. Prior to Lady-day, 1868, the lease was presented to him for signature, but he refused to sign it if he was to be annoyed by the rabbits in future as he had been before, and did not sign it. Upon paying his March rent he complained to the defendant of the annoyance he was suffering, and expressed his determination not to continue in occupation unless the rabbits were destroyed. The defendant thereupon promised to destroy them. At Michaelmas, 1868, the lease was again tendered by the defendant to the plaintiff for signature, when he complained a second time of the number of rabbits on the land, and refused to sign or continue to hold the land beyond the then current year unless the defendant undertook their destruction. The defendant then said, according to the plaintiff's evidence, "I promise you faithfully they shall be destroyed," and the plaintiff requested that a term to that effect should be inserted in the lease. The defendant refused compliance, but again promised that the rabbits should be destroyed, and the plaintiff accordingly signed the lease in its original form. It demised the land at a specified rental from year to year as from Michaelmas, 1867, and contained a stipulation that the tenant should not shoot, hunt, or sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow his landlord or friends at any time to hunt, shoot, or sport on the land.

The defendant failed to destroy the rabbits as he had promised, and the plaintiff, finding that they were even more troublesome than before, gave notice to quit, and quitted at Michaelmas, 1870. He afterwards brought this action.

The defendant denied that he had given the promise, and further

1871

MORGAN
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contended that, even if given in fact, it could not be received in evidence, inasmuch as it added to, and varied and was inconsistent with, the express terms of the lease. The judge considered that evidence of it was admissible, and asked the jury whether the lease had been signed by the plaintiff on the express promise by the defendant to destroy the rabbits. They found in the affirmative, and a verdict was entered for the plaintiff. The defendant appealed against the ruling of the judge; and the question for the Court was, whether the judge was right in admitting the parol evidence of the defendant's alleged promise, and in his direction to the jury.

Aspland, for the defendant. The plaintiff cannot rely on the contemporaneous verbal promise of the defendant. He is bound by the lease, and no new term can be added to it by parol evidence: *Goss* v. *Lord Nugent* (1); *Ramsden* v. *Dyson.* (2) It cannot be said that the agreement is wholly collateral. The plaintiff desired to have it embodied in the lease, but the defendant refused. It was one of the terms of the taking, which, not being reduced into writing with the others, cannot be enforced: *Powell* v. *Edmunds* (3); *Emery* v. *Parry.* (4) It imposes on the landlord an additional onerous obligation, and is inconsistent with the full enjoyment of the right of shooting for pleasure which is contained in the lease: *Jeffryes* v. *Evans.* (5) This inconsistency distinguishes the present case from *Lindley* v. *Lacey* (6), where evidence of an agreement wholly collateral to the written one, and relating to a different subject-matter, was admitted. Again, there was no consideration for this verbal promise.

[KELLY, C.B. The signature of the lease was a good and sufficient consideration. Suppose the plaintiff had refused to sign on the ground that the defendant had declined to promise to keep down the rabbits, and the defendant had filed a bill for specific performance in equity, or brought an action at law for non-performance of the agreement, in the former case no decree would have been made unless on the terms of the defendant's keeping

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(1) 5 B. & Ad. 58.

(2) Law Rep. 1 H. L. 129. 12 Jur NS 500.

(3) 12 East, 6.

(4) 17 L. T. (N.S.) 152.

(5) 19 C. B. (N.S.) 246; 34 L. J. (C.P.) 261. 11 Jur NS 584

(6) 17 C. B. (N.S.) 578; 34 L. J. (C.P.) 7. 10 Jur NS 110

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down the rabbits, and in the latter only nominal damages would be recoverable.]

The plaintiff was already bound to execute the lease.

Arthur Wilson (*Holl* with him), contrà, was not called on.

KELLY, C.B. All that is possible has been said on behalf of the defendant, but it has failed to convince me. I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease, and a court of equity would not have compelled him to do so, or only on the terms of the defendant performing his undertaking. The decision of the county court judge must therefore be affirmed.

PIGOTT, B. I am of the same opinion. The verbal agreement in this case, although it does affect the mode of enjoyment of the land demised, is, I think, purely collateral to the lease. It was on the basis of its being performed that the lease was signed by plaintiff, and it does not appear to me to contain any terms which conflict with the written document.

Judgment for the respondent.

Attorneys for appellant: *Torr, Janeway, Tagart, & Janeway.*
Attorneys for respondent: *Lewis, Munns, Nunn, & Longden.*

WATLING *v.* OASTLER AND ANOTHER.

Jan. 25.

[illegible]

Pleading—Liability of Master to Servant—Defective Machinery—Servant's ignorance of Defect.

Declaration by the administratrix of G. W. that the defendants were owners of a factory and machine, and G. W. was employed by them to work therein, and in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of the defendants it was unsafely constructed and in a defective condition, and was, by reason of not being sufficiently guarded, unfit to be used and entered, as the defendants well knew; and by reason of the premises, and also by reason, as the defendants well knew, of no sufficient apparatus having been provided by them to protect G. W., it was suddenly put in motion whilst he was at work in the machine, and he thereby sustained injuries from which he afterwards died. On demurrer:—

Held, that the declaration sufficiently shewed that the machine was set in

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motion by the defendants' negligence, and that it therefore disclosed a cause of action, although there was no allegation that G. W. was ignorant of the dangerous and defective character of the machine.

Semble, per Martin, B. The defendants would, under the circumstances alleged, be liable, even if the machine had been set in motion by a stranger.

DECLARATION by the administratrix of George Watling, that at the time, &c., the defendants were owners of a factory and machine therein, and George Watling in his lifetime was employed by the defendants as a labourer to work for them in the factory and machine; that in the course of his employment it was necessary for him to get into the machine for the purpose of cleaning and rectifying it; that by the negligence and default of the defendants the machine was constructed unsafely and in a defective and improper manner, and was, by reason of not being sufficiently guarded, in an unsafe and unfit condition for being used and entered in the manner aforesaid, which the defendants well knew; that by reason of the premises, and also by reason, as the defendants well knew, of no sufficient or proper apparatus having been provided by the defendants to protect the said George Watling, while so employed by them in and about the machine as aforesaid, from injuries arising from the unsafe and unguarded state of the machine, while the said George Watling was, in the course of his employment, cleaning and rectifying it, it was suddenly put in motion, and involved and cut him, and he afterwards died of his wounds. [Then followed the averments necessary under 9 & 10 Vict. c. 93, to entitle the administratrix to sue.]

Demurrer and joinder.

Prentice, Q.C. (*Murphy* and *R. V. Williams* with him), in support of the demurrer. The deceased was employed to do dangerous work to a defective machine, and it should have been averred in the declaration that he was not aware of the danger and defect. Unless he was ignorant, there was no duty in the defendants towards him. Their knowledge is not enough to make them responsible, if the deceased shared it.

[MARTIN, B. Surely that fact would be matter of defence. It is not necessary to allege in terms that the deceased was ignorant of the danger. There seems to me to be a primâ facie cause of action here. If Watling ran the risk of getting hurt with his eyes open, he was guilty of contributory negligence. But contributory negligence need not be negatived in pleading.]

The parties stood in the relation of master and servant, and that being so, ignorance of the danger ought to be alleged in order to make out even a primâ facie case. Although a plaintiff is not bound to negative a possible line of defence, he must shew facts which raise a legal duty: *Seymour* v. *Maddox* (1). But it is consistent with the declaration as it stands that the plaintiff voluntarily and with knowledge ran the risk; and if so, the defendants were under no duty towards him to guard the machine or to prevent its being set in motion: Smith's Master and Servant, 3rd ed. p. 214; *Southcote* v. *Stanley* (2); *Dynen* v. *Leach* (3); *Williams* v. *Clough* (4); *Indermaur* v. *Dames* (5). Again, it is not shewn that the machine was actually set in motion by the defendants. A stranger might have done it, or a careless fellow-servant, in which case the defendants would not be liable: *Metcalfe* v. *Hetherington* (6).

Keeble, contrà. The declaration sufficiently connects the defendants with the injury. It does, in fact, allege, although indirectly, that by their negligence and default the machine was set in motion. And even if it does not, there is still a cause of action against them. They were bound, knowing the dangerous character and defective construction of the machine, to take care that it was not and could not be set in motion while the deceased was cleaning it. If moved by a stranger, they were nevertheless responsible. They ought to have provided against such an event by properly guarding it. Again, the deceased's ignorance is matter which may be inferred from the allegations; and if not, there is still enough to raise a duty in the defendants towards the deceased. His knowledge of the dangerous and defective state of the machine is matter of defence, which need not be alleged or proved in the first instance: *Holmes* v. *Clarke* (7).

Prentice, Q.C., in reply.

(1) 16 Q. B. 326; 20 L. J. (Q.B.) 327.

(2) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(3) 26 L. J. (Ex.) 221.

(4) 3 H. & N. 258; 27 L. J. (Ex.) 325.

(5) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311. 12 Jur. N.S. 432

(6) 11 Ex. 257; 24 L. J. (Ex.) 314.

(7) 6 H. & N. 349; 7 H. & N. 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 356. 7 Jur. N.S. 398. 8 ib. 992.

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KELLY, C.B. This case is not by any means free from doubt, but looking at the declaration as a whole, I think it discloses a cause of action. It is enough if there be certainty in pleading to a common intent, and we should presume all that we reasonably can, in order to sustain a declaration which substantially shews a breach of duty in a defendant, although its terms may be somewhat ambiguous. Now here there is, in the first place, an express allegation that it was necessary for the deceased in the course of his employment to get into the defendants' machine in order to clean it. Then comes a positive statement that the machine was defectively constructed by reason of the defendants' default; and afterwards there is a distinct and precise allegation of the defendants' knowledge of the danger and inefficiency of their machine. It is then averred that "by reason of the premises"—a phrase which involves the whole of what goes before—and also "by reason, as the defendants well knew, of no sufficient or proper apparatus having been provided by the defendants" to protect the deceased while employed by them in the machine, the machine, while the deceased was cleaning it in the course of his employment, "was suddenly put in motion," whereby the deceased was so much injured that he died. We have, therefore, on the face of this declaration, distinct allegations of the original defective construction of the machine, of the defendants' knowledge of the defect, and of the occurrence of the injury to the deceased, in the course of his employment, the machine having been "suddenly put in motion" while he was in it; and I think that although it is not so stated in express words, we may gather that it was so set in motion by the defendants' negligence and default.

But it is further objected that there is no allegation that the deceased was himself ignorant of the defects and dangers of the machine, and that without such an allegation, no breach of duty is shewn to have been committed by his employers. Now it certainly would have been expedient had the declaration contained a definite averment of the deceased's ignorance. We must, however, recollect, although the old and more exact form of pleading in a case of this sort is no longer followed, the averment that the injury was caused "by reason of the negligence and default of the defendants" must be taken as equivalent to an averment in the old form that it was by their *mere* negligence and default. And so reading the words, I think it is unnecessary to allege in express terms that the deceased was ignorant of the defective character of the machine. If it were not so in fact, that will be matter of defence at the trial under the general issue. The defendants will, in that case, succeed in shewing that the accident did not occur through their *mere* negligence. But I am of opinion that the deceased's ignorance need not be alleged in terms.

With regard to *Southcote* v. *Stanley* (1), I will only say that the decision did not turn on the relation which exists between employer and employed, and the duties which arise from that relation. The case, moreover, seems to be somewhat loosely reported, and the judgments of the Court are evidently not given in full. The case, as it appears, certainly does not seem to me satisfactory, and I do not think it should govern our decision on this occasion.

MARTIN, B. I also think the declaration is sufficient. It contains enough to shew that the injury was caused by the defendants' default, and that the deceased did not know the risk he was running. Moreover, if a servant be employed by a master to clean or use a defective and dangerous machine, improperly constructed, and without a guard, and if the employer knows the defect and danger and the servant does not, and is therefore guilty of no contributory negligence, I am not prepared to say that the servant, in case he is injured whilst in the course of his employment, has no cause of action against his employer, although it may be that the employer did not himself set the machine in motion, but that some third person, unconnected with him, did so. Looking at the whole declaration, therefore, I think it discloses a cause of action in whichever way it is construed, and although the deceased's ignorance of the danger is not expressly averred. At all events, I am not prepared to say it does not, although it is framed very ambiguously. There is, however, enough certainty to a common intent to prevent us holding it bad on general demurrer.

PIGOTT, B. I am of the same opinion. The declaration shews

(1) 1 H. & N. 247; 25 L. J. (Ex.) 339.

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that the deceased was employed to clean a machine, known by his employers to be dangerous and defective. It charges them sufficiently both with knowledge of the defects, and with negligence. But then it is said that the deceased's ignorance of the danger and defects of the machine ought to have been averred. I do not think that necessary. It was not averred in *Mellors* v. *Shaw* (1), a similar case to this; and it seems to me rather matter of defence under the general issue. The knowledge of the deceased is no more than contributory negligence, and it is not needful in such an action as this to allege that the injured person did *not* contribute to the accident.

Judgment for the plaintiff.

Attorney for plaintiff: *Henry Smith.*
Attorneys for defendants: *Ford & Lloyd.*

Jan. 26.

ATTORNEY-GENERAL *v.* BLACK.

Income-tax—Liability of Local Coal Dues—Rate or Duty—5 & 6 Vict. c. 35, Scheds. (A), (D).

By 13 Geo. 3, c. 34, a power was given to Improvement Commissioners for Brighton, to levy a duty of 6*d.* on every chaldron of coal landed on the beach or brought into the town, for the purpose of erecting and maintaining groyns, &c., against the sea. By subsequent Acts the duty was continued and increased, and by 6 Geo. 4. c. clxxix. it was, together with rates which the commissioners were empowered to levy, market tolls, &c., to form a common fund for the general purposes of the Act, which included paving, lighting, and watching, and the maintenance of groyns and other sea works:—

Held, that the corporation (who had succeeded to the rights of the commissioners) were liable to pay income-tax in respect of the coal duty.

Aff'd in Ex. Ch. post 300

CASE stated under 22 & 23 Vict. c. 21, s. 10, upon an information against the town clerk of the Corporation of Brighton, to recover penalties for not making the returns required by 5 & 6 Vict. c. 35 (see ss. 40, 52, 54, 55). The information was brought to try the question, whether the corporation were liable to pay income-tax upon certain duties levied by them upon all coal, culm, &c., landed on the beach or brought within the limits of the town of Brighton.

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(1) 1 B. & S. 437; 30 L. J. (Q.B.) 333.

The duty was originally imposed by 13 Geo. 3, c. 34 (1), by which, after (pp. 623–638) empowering certain commissioners to pave, light, and cleanse the streets, and for that purpose (p. 628) to levy rates not exceeding 3*s.* in the pound, on the occupiers of all property in the town, and (pp. 642–653) to establish a market, the rents and profits of which were (after payment of moneys borrowed) to be applied towards paving, &c., the streets, and in repairing the groyns thereafter mentioned; and after reciting the erection of groyns to protect the town against the encroachments of the sea; it was enacted (pp. 654–655) that the commissioners should be trustees for the maintenance and erection of groyns, and such other works as should seem to them proper; and that for that purpose there should be paid to them the sum of 6*d.* for every chaldron of sea coal, culm, and other coal that should be landed on the beach or coast of Brighthelmstone, or otherwise brought into the said town within the parish of Brighthelmstone aforesaid; and the Act contained further provisions (pp. 655–656) for enabling the commissioners to enforce payment of the duties through the officers of customs at the port of Shoreham, and by detention and sale of vessels in the event of non-payment.

Under this Act the old groyns were maintained and new ones erected. The coal duty was received and the market established, and the rents and profits arising from it duly collected and applied.

By 50 Geo. 3, c. xxxviii., the former Act was, with certain exceptions, repealed (s. 1), and after reciting its provisions, and that the coal duties had been found inadequate, the commissioners were, by s. 107, authorized and required to erect and maintain such works as should appear necessary for the safety of the town, or of the beach or shore within the town; and it was enacted that there should be paid to them any *rate or duty* which they should order and direct, not exceeding 3*s.* in the pound, for every chaldron of sea coal, culm, or other coal, which should be landed on the beach of the town or in any other manner, by land carriage or otherwise, brought or delivered within the limits of the town. By ss. 108–111, further powers were given for levying the duties, and (by s. 114) for borrowing 5000*l.* on the credit thereof; and it was provided that a drawback should be returned of the whole *rate or duty* for every chaldron landed to be forwarded, and forwarded to any other place for sale or consumption. By s. 116, after the payment of moneys borrowed on the credit of the duties, and of the expenses of erecting and maintaining the groyns and other works, the commissioners were empowered to apply any surplus in aid of the rate for paving, watching, lighting, and cleansing, as they should think reasonable and proper. They were also empowered (s. 82) to levy on the occupiers of property in the town to an amount not exceeding 4*s*. in the pound in any one year for paving, lighting, cleansing, and watching. Further powers were given (ss. 99–106) for enlarging and regulating the market; the surplus arising from the market, or the rents or tolls thereof, was directed to be applied, either in aid of the rate for paving, cleansing, lighting, and watching, or of the coal duty, as to the commissioners should seem reasonable and proper.

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(1) Printed among the public Acts, but with the sections not numbered.

By the Brighton Town Act (6 Geo. 4, c. clxxix.), which recited and repealed the above-mentioned Acts (s. 1), and appointed new commissioners (s. 3), it was enacted (s. 117) that all the rates, tolls, duties, assessments, and impositions, authorized by the Act (except the watering rate (ss. 59, 60)), should when received be consolidated into and form one fund, and be applicable by the commissioners for the general purposes of the Act.

The general purposes included repairing, lighting, watching, and cleansing the streets, &c. (ss. 34, 37, 41, 50, 70); providing fire-engines (s. 61); the purchase of lands, &c., for widening and improving streets, or for providing a site for a town-hall (s. 97); the erection of a town-hall, the extension of the market, the erection of a town pound and of a prison (s. 139); the establishment of a provision market (s. 148), and of a corn, hay, and cattle market (s. 149); and the erection and maintenance of groyns, walls, jetties, piers, &c. (s. 162).

By s. 133 the commissioners were empowered to levy a rate, not exceeding 4*s*. in the pound in any one year, on the tenants or occupiers of all tenements or hereditaments whatsoever within the town, except agricultural land and buildings.

By s. 163 there was to be paid to them any *rate or duty* which they should direct, not exceeding 8*s*. for every chaldron of coal or culm, and further duties were granted them on coke (not exceeding 1*s.* 6*d.* per chaldron), on cinders and ashes (not exceeding 1*s.* per chaldron), and on charcoal (not exceeding 1*d.* per bushel), and so in proportion for any less quantity which should be "landed on the beach of the town, or in any other manner by land carriage or otherwise, brought or delivered within the limits of the town."

By ss. 164–169 similar powers to those contained in the repealed Act were given, for securing payment of the duty.

By s. 171 a drawback of the whole *rate or duty* was allowed on all coal, culm, or coke landed or unloaded within the limits of the Act "for the purpose of being forwarded to any other place or places, and not to be consumed within the said limits," and which was so forwarded.

The town was on the 1st of April, 1854, incorporated by charter under 1 Vict. c. 78, s. 49, and by The Brighton Commissioners Transfer Act, 1855, the corporation were appointed commissioners for carrying the Brighton Town Act into execution.

The Local Government Act, 1858 (21 & 22 Vict. c. 98), was adopted in 1860, and the corporation became the local board. By a provisional order under that Act, confirmed by the Local Government Supplemental Act, 1861 (24 & 25 Vict. c. 39), the two latter Acts were incorporated with the local Acts, certain parts of the Brighton Town Act (including ss. 61, 97, and 133) were repealed, and the purposes of the unrepealed parts were to be deemed to be purposes of the Public Health Act and the Local Government Act. S. 87 of the Public Health Act (11 & 12 Vict. c. 63), provides for the levying a general district rate.

In the year ending the 31st of August, 1866, the coal duties produced 10,358*l.*, and it was stated in the case that they amounted annually to 9000*l.* or 10,000*l.* beyond the cost of collection.

Income-tax was paid on the coal duties from 1858 to 1865, under Sched. (A.) of 5 & 6 Vict. c. 35, but in 1866 payment was refused. In 1867–1868 assessments, in default of returns, were made (under Sched. (D.) in consequence of 29 & 30 Vict. c. 36, s. 8), but payment was refused by the corporation.

The question for the opinion of the Court was, whether the rates and duties levied by the Corporation of Brighton on coal, culm, coke, cinders, ashes, and charcoal, in manner above mentioned, were chargeable with income-tax.

Jan. 24, 26. *Sir R. P. Collier, A.G.* (*Hutton* with him), for the Crown, referred to 5 & 6 Vict. c. 35, ss. 1, 40, 60, Sched. (A.), No. III., which enumerates, under tenements and hereditaments: "third, . . . rights of markets and fairs" and "tolls;" and s. 100, Sched. (D.), 6th Case, and to *Attorney-General* v. *Jones* (1), and contended that the coal duties were no more exempt from income-tax than the market tolls, in respect of which the liability was admitted.

[MARTIN, B. Is not this a tenement? See Co. Litt. 19 (b) 20 (a)].

THE COURT called on

Manisty, Q.C. (*G. Bruce* with him), for the defendant. The coal duty is to be looked at with reference to the Act of 6 Geo. 4, c. clxxix., by which it is amalgamated with the rates into a common fund applicable to general purposes. This provision deprives it of any peculiar character which it may have originally had.

[MARTIN, B. The same argument would apply to the market tolls, and to the property of corporations brought into the Borough Fund, by s. 92 of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76). How does this duty differ from the port dues and other tolls, owned by Liverpool and many other towns, which have always been taxed to the income-tax?]

The duty is in its own nature a tax, and not a property or a profit. It is imposed in effect on the inhabitants of the town, and in respect of coals consumed in the town; and a drawback is allowed on coals merely landed for the purpose of further transport. The case might be otherwise if, as in the cases referred to by Martin, B., the tax were imposed on the public generally. But here it coincides in its limits with the rate-paying district, and falls upon the same persons who would have to pay the rates which are aided by it. That it is exempt, is shewn by s. 102, which provides for the payment of the tax on interest upon money lent on rates or assessments not chargeable by the Act, which implies an exemption of rates; but this is both by its nature and its name a rate.

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(1) 1 Mac. & G. 574.

Sir R. P. Collier, A.G., in reply. To refer to s. 102 is begging the question; the section implies that there may be rates and assessments chargeable to income-tax. In 12 Car. 2, c. 4, customs duties are called rates; and there can be no doubt if customs duties were in private hands they would be liable. This is not a tax imposed by the community on themselves, but it is a tax on strangers, whether it be taken in regard to the importer who actually pays the duty, or to the consumer on whom it ultimately falls; the drawback is not on all coal taken out of the town, but only on coal landed for the purpose of being forwarded and actually forwarded. The power to vary the duty can make no difference; it could make none in private hands; the reason of it is the variation in the exigencies it is to meet; but the purpose to which it is applied cannot exempt it, if in its nature it is taxable.

KELLY, C.B. I am of opinion that the Crown is entitled to our judgment. A grant has been made to the Corporation of Brighton of a coal duty from which they derive an annual income amounting, as is stated in the case, to the sum of 10,000*l.* This income is, primâ facie, as much liable to income-tax as if it were possessed by a private individual; the question therefore is, whether there is anything in the nature of the duty, or in the purpose for which it was granted, or to which it is to be applied, or, to use an expression more familiar to political economy than to law, in the incidence of the tax, which will exempt it from this liability. No solid argument has been presented to us in favour of this contention. First, it was said that the duty was applicable in general to those purposes to which the rates levied on inhabitants, or those levied on householders only, are ordinarily applied; in short, that it was applicable to borough, or indeed to strictly parochial purposes. It is true that among the purposes to which the amalgamated fund, which includes the proceeds of this duty, is appropriated by the later of the Acts regulating its receipt and application (6 Geo 4, c. clxxix.), some of the purposes I have mentioned, such as "paving, lighting, &c.," are to be found; but we also find in the enumeration of purposes in the same proviso, the much larger purposes of purchasing lands to widen and improve streets, erecting a town-hall, a market-house, &c. No doubt if a fund were to be applied simply and merely to purposes producing a result that would itself not be liable to taxation, such for instance as sewers, it would be a strong argument to shew that the fund was not itself liable to taxation. But the fund in question might, for instance, be applied to establishing a market, the tolls of which would undoubtedly be liable to income-tax. Why then should not the fund itself be so? Coupling this consideration with the nature of the duty in question, that duty is unquestionably within the terms of the Act.

It is said that, by analogy with the other elements of which the amalgamated fund is composed, it ought to be free from taxation. But the same might be said of the property of municipal corporations in general, because, under s. 92 of the Municipal Corporation Act, it forms, together with rates, a common fund which is applicable to all the ordinary purposes of municipal government.

As to the argument that the use of the phrase *rate or duty* proves anything as to the character of the coal duty in question, it is answered by the Act of 12 Car. 2, c. 4, to which the Attorney-General drew our attention, where the word is applied to custom duties.

It only remains to consider whether, as was contended, this is in substance and reality a tax only on the inhabitants of Brighton, or still more, on the rateable inhabitants only. It is certainly no such thing. If we trace from its first collection to its ultimate destination the tax on every ton of coals imported, we find that the incidence of the tax is by no means confined to the rate-payers nor even to the inhabitants, but that it must (as is the case with every tax) fall upon the consumer, who may live, perhaps, at a considerable distance from Brighton. In the first instance, no doubt, it is paid by the merchant who imports the coals; but he sells to the poor as well as to the rich, to the non-rate-paying as well as to the rate-paying inhabitants; he may further sell, and probably will sell, a considerable proportion to persons resident in

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the neighbourhood, not within the limits of the local rates. If, therefore, as I have said, the incidence of the tax falls at last on the consumer, the incidence is not on the rated inhabitants of Brighton alone, but is in part, at least, on persons resident without its limits.

MARTIN, B. I am of the same opinion. The real question as to the liability to income-tax of the produce of these coal duties depends on whether they come within the designation of property or profits. By the structure of the various provisions of 5 & 6 Vict. c. 35, it is plain the legislature meant to include every kind of property yielding income. Sched. (A), which is contained in the first section, includes "all lands, tenements, and hereditaments;" and I think there is reason for contending that this duty is a tenement. But it is not necessary to decide this, for s. 100 provides that the duties contained in Sched. (D) "shall extend to every description of property or profits which shall not be contained in either of the said Scheds. (A), (B), or (C), and to every description of employment of profit not contained in Sched. (E)." The section then contains rules for ascertaining the duties in the particular cases mentioned in the section; and the sixth case which it gives is as follows: "The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other schedules contained in this Act." It seems almost impossible that any net could be extended more widely; every possible source of income seems included.

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The quality and nature of this duty depends, in my opinion, on the Act of 13 Geo. 3, c. 34. The subsequent statute enacts, that the whole of the duties shall go, with the other items of revenue of the commissioners, into a common fund; and in the general district account of the corporation, who have now succeeded to the rights of the commissioners, after several rates which would not be within the Income-tax Act there come the coal duties in question, followed by market dues and rents of land. All these sources of revenue are brought by the Act into one fund; but that does not alter the character of the duties as determined by the earlier Act. This may be exemplified by the Municipal Corporations Act, which directs (s. 92), that "the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities," the property of the corporation, shall go into the borough fund, and be applicable to the general purposes mentioned in the section. No one would contend that because it was so enacted, the large property belonging to several municipal corporations, such as Liverpool, could not be taxed; the only effect is that the income of the public property is brought in to contribute to the public expenses.

What, then, is the effect of the Act of 13 Geo. 3, c. 34? Powers are given by it to the commissioners, to whose rights the Corporation of Brighton have succeeded, to purchase lands, and establish a market; these powers they have exercised, and the corporation admit their liability to pay income-tax in respect of the market tolls thence derived, in respect, therefore, of one species of property created by the Act. The Act then goes on to recite that the groyns are out of repair, and for the purpose of restoring them and keeping them in repair, it enacts that the commissioners may take the coal dues now in question. It seems to me, therefore, that a property has been created by this Act, to which the corporation would under the Act still be entitled, if the repair of the groyns did not cost a farthing a year. The consideration for the grant of the duties was the repair of the groyns, but the duties were not measured by that consideration any more than where tolls are granted in consideration of the maintenance of a lighthouse, which often far exceed the cost of maintenance. This, therefore, appears to me a species of property falling within the description in the Act of "property or profits," and is, therefore, subject to the payment of income-tax.

KELLY, C.B. My Brother Channell, who heard the whole of the argument, has desired me to say that he entirely concurs in the judgment now pronounced.

Judgment for the Crown.

Attorney for the Crown: *The Solicitor of Inland Revenue.*

Attorney for defendant: *Tilleard & Co., for D. Black, Town Clerk, Brighton.*

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Jan. 14.

County Court—Rule calling upon County Court Judge to amend Case—Malicious Prosecution—Reasonable and Probable Cause.

On the hearing of an action for malicious prosecution in the county court to which it was remitted (under 30 & 31 Vict. c. 142, s. 10), the judge who tried the cause ruled that there was an absence of reasonable and probable cause. The defendant appealed. The judge stated a case, in which he gave what he stated to be the *result* of the evidence, but did not set out the evidence in detail, nor insert the depositions before the police magistrate, which were put in evidence at the hearing. On an application by the defendant:—

Held, that the judge must amend the case by setting out the depositions and the other evidence material to the question of reasonable and probable cause.

THIS was an action for malicious prosecution, which was brought in this court, remitted for trial to the Lambeth County Court, and tried on the 10th of September, 1870, before the deputy judge. The judge ruled that there was no reasonable and probable cause, and the jury found a verdict for the plaintiffs for 50*l.*

The defendant gave notice of appeal on the ground (amongst others) that the facts did not justify the judge in ruling that there was an absence of reasonable and probable cause. The judge stated a case, in which he gave a summarized statement in a narrative form, of the facts proved at the trial, adding, "the above statement gives the result of the evidence so far as is material for the determination of the question raised for the opinion of the Court of Appeal." He did not, however (except occasionally), state what facts were proved by what witnesses, nor did he set out any part of the evidence verbatim, nor did he set out the depositions taken before the police magistrate, which were put in evidence at the trial.

The defendant obtained a rule calling on the judge and on the plaintiffs to shew cause why the judge should not amend the case by setting out the evidence given at the trial, so far as was material to the question of reasonable and probable cause, and by setting out the depositions taken before the magistrate and put in evidence at the trial.

The defendant's attorney made an affidavit as to evidence omitted from the case as drawn by the judge.

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Bromby and *Dodd* shewed cause. Under s. 43 of 19 & 20 Vict. c. 108 (amended by 21 & 22 Vict. c. 74, s. 4), the present form of procedure is substituted for the writ of mandamus; but the remedy, though changed in form, is not extended, and the Court will not grant a rule under that section, where it would not have formerly issued a mandamus. It has accordingly been held that a rule will not be granted where the matter is within the discretion of the judge: *Clifton* v. *Furley* (1); *Furber* v. *Sturmy* (2); *Fortescue* v. *Paton* (3); *In re Corbett.* (4)

[CHANNELL, B. This is not a matter of discretion at all. The learned judge is bound to state a case, in order that this Court, which is to hear the appeal from his judgment, may have the proper materials for forming an opinion.

MARTIN, B. He is asked to do no more than any judge of the superior courts does, who is required to sign a bill of exceptions.]

The Court cannot act upon the defendant's affidavit; but, if it could, the affidavit shews no material omission, and therefore practically answers the defendant's application.

[MARTIN, B. I am not prepared to say if it were shewn on affidavits that material evidence was given at the trial which was not set out in the case, that we should not compel the judge to set out that evidence. But that question does not arise here; the learned judge only professes to give the "result" of the evidence, he does not say that he has set out the whole.]

G. Bruce was not called on to support the rule.

KELLY, C.B. The learned judge has only set out the "result" of the evidence, and such as he deems material; but we have to consider whether his judgment was correct, and we cannot determine this without knowing, not only what on his construction of the evidence he deemed material, but the whole evidence on which he formed his opinion.

MARTIN, B. I am of the same opinion. We ought not to call on a county court judge to do anything that we should not feel obliged to do ourselves in the like circumstances; but it is impossible to decide upon the case without having the whole evidence before us.

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(1) 7 H. & N. 783; 31 L. J. (Ex.) 170.

(2) 3 H. & N. 521; 27 L. J. (Ex.) 453. 4 Jur. N.S. 956.

(3) 3 L. T. (N.S.) 268.

(4) 4 H. & N. 452; 28 L. J. (Ex.) 254.

CHANNELL, B., concurred.

Rule absolute.

Attorney for plaintiffs: *C. V. Lewis.*
Attorneys for defendant: *Pattison & Wigg.*

BROOK *v.* HOOK.

Jan. 27.

1 C.P.D. 530

Ratification—Forged Signature to Promissory Note—Ratifying a Forgery—Construction of Written Document—Province of Judge and Jury.

The defendant's name was forged, by one Richard Jones, to a joint and several promissory note for 20*l.*, dated the 7th of November, 1869, and purporting to be made in favour of the plaintiff, by the defendant and Jones. While the note was current the defendant signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority:—"I hold myself responsible for a bill dated the 7th of November, 1869, for 20*l.*, bearing my signature and Richard Jones' in favour of Mr. Brook [the plaintiff]." At the trial of an action against the defendant on the note, the judge ruled that this memorandum was a ratification, and directed the jury that the only question for them was, whether the defendant signed it. It being admitted that he did, a verdict was entered for the plaintiff:—

Held (per Kelly, C.B., Channell and Pigott, BB., Martin, B., dissenting), a misdirection:

Per Kelly, C.B., Channell and Pigott, BB., that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void and incapable of ratification; but that it was, in fact, an agreement by the defendant to treat the note as his own in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on an illegal consideration.

Semble, that the memorandum being ambiguous in its terms, it should have been left to the jury to say what its real meaning was when looked at in connection with the circumstances under which it was signed.

DECLARATION on a promissory note. Plea: traversing the making of the note. Issue.

At the trial before Martin, B., at the Bristol Summer Assizes, 1870, the following facts were proved:—In July, 1868, Richard Jones, a brother-in-law of the defendant, applied to the plaintiff

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for a loan of 50*l.* The plaintiff declined to lend the money unless a substantial name was given as security. Jones said that he thought the defendant would join him in a note, and one was soon afterwards given to the plaintiff, purporting to be signed by Jones and the defendant, which was renewed and eventually partly paid off by Jones. On the 7th of November, 1869, there was a balance of 20*l.* remaining due, and on that day the plaintiff received by post from Jones the note now sued on, which was in these terms:—

"Yatton, Nov. 7, 1869. Three months after date we jointly and severally promise to pay Mr. Brook, or his order, the sum of 20*l.* for value received.

"Richard Hook,
"Richard Jones."

On the 17th of December, 1869, whilst the note was still current, the plaintiff saw the defendant, who denied his signature. The plaintiff then said that it must be a forgery by Jones, and that he would consult a lawyer as to taking criminal proceedings against him. The defendant replied that he would rather pay the money than that Jones should be prosecuted, and, subsequently, at the plaintiff's instance, signed the following memorandum, at the same time again denying that he had ever signed, or given Jones authority to sign, the note:—

"Memorandum; that I hold myself responsible for a bill, dated Nov. 7th, 1869, for twenty pounds, bearing my signature and Richard Jones', in favour of Mr. Brook. Huntspill, Dec. 17th, 1869.

"Richard Hook."

It was not disputed that the signature to the note was forged, or that the defendant had, in fact, signed this memorandum. The learned judge directed the jury that the plaintiff was entitled to the verdict, if the defendant had signed the memorandum, the construction of the document being, in his judgment, a question for him, and his opinion being that it amounted to a ratification of the contract professedly made in the defendant's name on the face of the note. A verdict was accordingly entered for the plaintiff. In Michaelmas Term, 1870, a rule was obtained by the defendant, calling on the plaintiff to shew cause why there should not be a new trial, on the ground that the verdict was against the evidence, and for misdirection in this, that the learned judge directed the jury that the only question for them was, whether the memorandum of the 17th of November was signed by the defendant.

Jan. 12. *Kingdon, Q.C.*, *Collins*, and *R. D. Bennett*, shewed cause. The defendant's signature to the memorandum was not disputed, and, on the true construction of that document, he thereby ratified the act of Jones, in placing his name to the note without his authority: *Wilson* v. *Tumman.* (1)

[KELLY, C.B. The defendant could not ratify an act which did not profess to be done for him or on his account. Here the signature was a forgery. Could that be ratified?]

The act purported to be done for the defendant. If Jones had said, "I sign for Hook, with his sanction," he would only have expressed in language what the act of writing the name on the note already sufficiently expressed: Byles on Bills, 10th ed. p. 199. In *Ashpitel* v. *Bryan* (2), Crompton, J., refers to a case tried by him at Bristol, where the facts were almost exactly identical with the present case, and where he held the plaintiff was entitled to recover. Again, the defendant is estopped from denying that the note was his. His conduct altered the condition of the plaintiff, who, after getting the defendant's signature to the memorandum, might, if he had pleased, have negociated the note: *Leach* v. *Buchanan* (3); *Reg.* v. *Woodward* (4); Greenleaf on Evidence, vol. i. p. 50. Further, the meaning of the memorandum, which was an instrument complete in itself, was not a question for the jury: *Heffield* v. *Meadows.* (5)

[MARTIN, B., referred to Broom's Legal Maxims, 5th ed. p. 871, citing *Bird* v. *Brown* (6), and *Ridgway* v. *Wharton.* (7)]

Lopes, Q.C., and *Poole*, in support of the rule. The law of ratification does not apply to this case; for Jones never pretended or suggested that he was the defendant's agent to sign the note:

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(1) 6 M. & G. 236.

(2) 3 B. & S. at p. 492; 32 L. J. (Q.B.) at p. 95. 9 Jur NS 794.

(3) 4 Esp. 226.

(4) Leigh & Cave, C. C. 122; 31 L. J. (M.C.) 91. 8 Jur NS 105.

(5) Law Rep. 4 C. P. 595.

(6) 4 Ex. 786; 19 L. J. (Ex.) 154.

(7) 6 H. L. C. at p. 296.

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Story on Agency, 7th ed. s. 251, a; *Saunderson* v. *Griffiths* (1); *Routh* v. *Thompson* (2); *Lucena* v. *Craufurd* (3); *Hagedorn* v. *Oliverson.* (4) Moreover, no one can ratify a felonious act: Story on Agency, 7th ed. ss. 240, 241. The case referred to by Crompton, J., in *Ashpitel* v. *Bryan* (5), is distinguishable. There the position of the plaintiff had been materially altered, and the question was not one of ratification, but of estoppel: *Pickard* v. *Sears.* (6)

[CHANNELL, B. The doctrine of estoppel is quite distinct from that of ratification, and is based on different premises.]

Secondly: The question of the real meaning of the memorandum, as interpreted by the previous conversation between the parties, and the surrounding circumstances, ought to have been left to the jury: *Wilkinson* v. *Stoney* (7); *Heane* v. *Rogers.* (8) It is ambiguous, and might be read in one sense as a guarantee, in which case it would be invalid as being founded on an illegal consideration, viz., the forbearance of a prosecution for forgery.

Cur. adv. vult.

Jan. 27. The Court differing in opinion, the following judgments were delivered:—

MARTIN, B. This was an action upon a promissory note tried before me at the last Bristol Assizes.

The note was dated the 7th of November, 1869, whereby the defendant and one Richard Jones jointly and severally, three months after date, purported to promise to pay the plaintiff or his order 20*l.* for value received. The plea traversed the making of the note.

The plaintiff was called as a witness, and stated that in July, 1868, Richard Jones applied to him for a loan of 50*l.*, and told him that the defendant Hook (who was his brother-in-law) would join him in a note as surety; that a note was given to him purporting to be signed by the defendant and Jones, which was renewed and partly paid off; and that upon the 7th of November, 1869, there was 20*l.* remaining due; that upon that day he received by post the note sued upon, and believed the signatures to be those of the defendant and Jones; that upon the 17th of December, 1869, whilst the note was current, he saw the defendant and shewed the note to him, and said that the note purported to be signed by him; that the defendant denied the signature to be his; that the plaintiff said, if so, it must be a forgery of Jones, and that he would consult a lawyer with the view of taking criminal proceedings against him; that the defendant begged him not to do so, and said he would rather pay the money than that he should do so; that the plaintiff then said he must have it in writing, and that if the defendant would sign a memorandum to that effect he would take it; and that the defendant then signed a memorandum as follows:—

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(1) 5 B. & C. 909.

(2) 13 East, 274.

(3) 1 Taunt. 325.

(4) 2 M. & S. 485.

(5) 3 B. & S. at p. 492; 32 L. J. (Q.B.) at p. 95.

[illegible] 794

(6) 6 A. & E. 469.

(7) 1 J. & S. 509.

(8) 9 B. & C. 577.

"Memorandum, that I hold myself responsible for a bill, dated Nov. 7th, 1869, for 20*l.*, *bearing my signature* and Richard Jones', in favour of Mr. Brook.

"Richard Hook:

"Decr. 17th, 1869."

that when the document was signed the plaintiff understood the defendant denied the signature to be his; that he only knew the defendant from what Jones had said of him, and that he had no idea the note was a forgery until he saw the defendant.

This was the plaintiff's case, and the learned counsel for the defendant proposed to call the defendant to prove that the note was a forgery and that his name was forged. I stated that, in my opinion, that was an immaterial circumstance, and that if he signed the memorandum of the 17th of December the plaintiff was entitled to the verdict upon the issue joined, and that it was for me, and not for the jury, to determine what was the construction of that document. Thereupon the verdict was entered for the plaintiff, and I stayed execution until the fourth day of the following term.

A rule has been obtained for a new trial upon the following grounds: First, that the verdict was against the evidence; and, secondly, for misdirection, viz., that the judge directed the jury that the only question for them was, whether the memorandum of the 17th of December was signed by the defendant. The statement, as to my direction, is substantially correct, and if I was wrong in holding that the signing and making by the

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defendant of the memorandum of the 17th of December entitled the plaintiff to the verdict upon the issue joined, the defendant is entitled to have the rule made absolute, and to have a new trial. On the argument I asked the learned counsel for the defendant what he deemed to be the proper direction to the jury, and he stated it ought to have been as follows: "That having regard to what took place, and the circumstances under which the memorandum was given, the jury ought to have been asked whether the defendant intended to ratify and confirm what had been done by Jones in forging his name, or whether he intended to guarantee the payment of the note." Now I am of opinion that I could not lawfully have submitted this question to the jury. In the first place, I am of opinion that when the defendant signed a memorandum professing to be an entire and complete writing evidencing a transaction, the construction of that document, and not his intention, other than shewn by the writing, is the true test; and further, that it is a matter of law for the judge to construe the document, and its construction was not a matter to be submitted to the jury. A case was cited from an Irish report, *Wilkinson* v. *Stoney* (1), that under the circumstances in that case there was a question for the jury. I have no doubt that that case was rightly decided; but there the writing was a letter, and there were other facts bearing upon the transaction, but the present was the case of a single writing made for the purpose of evidencing a transaction, and I entertain no doubt that such a writing is to be construed by the judge and not by the jury; if it were not so, there would be no certainty in the law; and, secondly, there was no evidence here that the document was a guarantee, or intended to be a guarantee, but it merely was, that the defendant was responsible upon the note. I am, therefore, of opinion that I would have acted erroneously if I had submitted the above question to the jury. And I remain of opinion that, under the circumstances of this case, the only question for the jury was, whether the memorandum of the 17th of December was the memorandum of the defendant, and that my ruling was right, that if it were, it was a ratification of the contract made in the name of the defendant, and binding upon him upon

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(1) 1 J. & S. 509.

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the legal principle that "omnis ratihabitio retrotrahitur et mandato æquiparatur:" Co. Litt. 207, a.

I apprehend that the circumstance of Jones being a party to the note is immaterial, and that the question is the same as if the note were several and the defendant's name alone on it; and in my view of the case the facts may be taken to be that upon the morning of the 17th of December the defendant was not liable upon the note because his signature was forged; that the plaintiff took and held the note believing that the signature was a genuine one, and that the contract to pay was the contract of the defendant; and that the defendant, upon the statement that a lawyer would be consulted as to the criminal responsibility of Jones, signed the document of the 17th of December. In my opinion this was a ratification within the meaning of the above maxim, and rendered the defendant liable to pay the note. A ratification is the act of giving sanction and validity to something done by another. Jones, purporting to utter an obligatory and binding security, had given to the plaintiff the note bearing the defendant's name, and the defendant, by the writing signed by him, declared that "he held himself responsible upon it, it bearing his signature;" and if that was not giving sanction and validity to the act of Jones in delivering the note so signed to the plaintiff, I am at a loss to know what a sanction or ratification is. To say it is not, seems to me a plain misconstruction of a written document, and the denial of a self-evident proposition.

Suppose nothing had been said as to criminal proceedings against Jones, and that the defendant, upon being shewn the note by the plaintiff, had merely said, "The writing is not mine, but I am responsible for it," can any one doubt that the maxim would have applied, and that the defendant had ratified the transaction? It is so stated by Mr. Justice Burton in the case of *Wilkinson* v. *Stoney* (1) before cited, and he was one of the most eminent of modern lawyers. Then does the circumstance that the plaintiff said that he would consult a lawyer in regard to criminal proceedings against Jones make any difference? I think not. A ratification of a contract is not a contract, it is an adoption of a contract previously made in the name of the ratifying party. The contract, if a simple con-

(1) 1 J. & S. 509.

tract, must have been made upon a valuable consideration. If it were not, the adoption or ratification of it would be of no avail. This is the true meaning of the sections cited by Mr. Lopes from Story on Agency. If a contract be void upon the ground of its being of itself and in its own nature illegal and void, no ratification of it by the party in whose name it was made by another will render it a valid contract; but if a contract be void upon the ground that the party who made it in the name of another had no authority to make it, this is the very thing which the ratification cures, and to which the maxim applies "omnis ratihabitio retrotrahitur et mandato æquiparatur." No words can be more expressive. The ratification is dragged back as it were, and made equipollent to a prior command.

A ratification is not a contract, and requires no consideration. It was so said by Mr. Justice Burton in the case before referred to. It may be, and is, that a contract "in consideration that the holder of a promissory note would not prosecute a man for the felony of forging a name to the note, the defendant would pay the note or guarantee the payment of it" would be illegal and void; but there was no evidence of such a contract, even in words, in the present case; and if there were, there would be a legal principle to prevent its operation, for the written memorandum was made and signed for the purpose of evidencing the transaction, and there is not a word of contract in it either on behalf of the plaintiff or indeed of the defendant. It is what it was intended to be, a ratification or adoption by the defendant of the signature and contract made in his name, it may have been by a forger, or it may have been under circumstances which would not have justified a conviction for that offence. For the purpose of my judgment I assume it was a forgery for which Jones might have been convicted. The case of *Wilson* v. *Tumman* (1) was cited on both sides; it is a case of great authority, and is a considered judgment. It is there laid down "that an act done for another by a person not assuming to act for himself, but for such other person, *though without any precedent authority whatever*, becomes the act of the principal if subsequently ratified by him. In such case the principal is bound by the act whether it be for his detriment or advantage,

(1) 6 M. & G. 236.

and whether it be founded on a tort or on contract to the same extent and with all the same consequences which follow from the same act done by his previous authority." Several other cases were cited to the same effect, but there is no doubt about it. Tindal, C.J., lays it down as the known and well established rule of law; and, as it seems to me, it is conclusive in the favour of the plaintiff in the present case.

But it was said that a forged signature cannot be ratified. No authority was cited for this, and I believe none can be found. In one sense, perhaps, a forgery cannot be ratified or condoned as regards the forger, but there is no authority whatever to distinguish the ratification of a parol contract and of a written one made by one person in the name of another without authority. The expression of Tindal, C.J., is "made without any precedent authority whatever," which would clearly include a forged document. There is in Mr. Broom's Treatise on Legal Maxims, p. 807, a comment upon the maxim, and also in Mr. Justice Story's Book on Agency, beginning at s. 239; and in neither of these treatises is one word to be found drawing any distinction between the ratification of a written contract which was in its inception a forgery, and one which was not of that character—the foundation of ratification of contracts is throughout deemed to be, that the contract originally purported to be by and in the name of the person ratifying. But there is authority to the contrary. In the before cited case of *Wilkinson* v. *Stoney* (1), Mr. Justice Burton clearly shews that he thought a forged acceptance of a bill could be ratified; and in *Ashpitel* v. *Bryan* (2), the late Mr. Justice Crompton stated that a cause had been tried before him where a father was sued upon his acceptance forged by his son. The party who held the bill went to the father and said, "We shall proceed against your son—Is this your acceptance?" and the father said, "It is;" and upon this evidence he thought the rule as to estoppel in *Freeman* v. *Cooke* (3) applied, and that the father was liable. He says that a bill of exceptions was tendered to his ruling by a very learned person, but after consideration it was abandoned. He goes on to say that he was not sure whether the party had knowledge that it was not the acceptance of the father, but he says that in his opinion that was immaterial, and that the person making the statement must be considered as saying, "The instrument may be treated as if accepted by me." This case seems to me to be identical with the present; and with me no higher authority exists than the judicial opinion of Mr. Justice Crompton. He put the case on the ground of estoppel. I think the doctrine of ratification the more applicable, but whether such a document as that of the 17th of December operates by way of estoppel or by that of ratification, in my opinion it rendered the defendant liable. I still think, upon these grounds, that my ruling at nisi prius was right, and that the rule ought to be discharged.

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(1) 1 J. & S. 509. (2) 3 B. & S. at p. 492; 33 L. J. (Q.B.) at p. 95.
(3) 2 Ex. 651; 18 L. J. (Ex.) 114.

(2) S.C. 9 Jur. N.S. 794.

The judgment of Kelly, C.B., Channell and Pigott, BB., was delivered by

Kelly, C.B. This is an action on a promissory note payable two months after date, and purporting to bear the signatures of one Jones and of the defendant. The declaration is on the note, and the defendant has pleaded that he did not make the note.

Upon the trial it appeared that the signature of the defendant to the note was not his own, and it was assumed by the learned judge who tried the cause, and by counsel on both sides, that it was a forgery; consequently, if the case had rested there the defendant would have been entitled to the verdict. But it was proved that Jones having been indebted to the plaintiff upon a previous bill in part paid, leaving £20 still due, the note in question was handed by Jones to the plaintiff for that balance of £20. When the note was about to become due the plaintiff had an interview with the defendant, at which, upon the note being mentioned, the defendant at once declared that it was not his signature, and it was perfectly understood between them that it was, in truth, a forgery; whereupon the plaintiff said that he should consult his solicitor with a view to proceed criminally against Jones; upon which the defendant said, rather than that should be, he would pay the money. Upon this the following paper was drawn up by the plaintiff, and was signed by the defendant:—

"Memorandum; that I hold myself responsible for a bill dated 7th of November, 1869, for 20*l.* bearing my signature and Richard Jones', in favour of Mr. Brook."

Upon this evidence it has been contended on behalf of the plaintiff that this paper was a ratification of the making of the note by the defendant, and, upon the principle "omnis ratihabitio retrotrahitur et mandato priori æquiparatur," the jury were directed to find that the note was the note of the defendant, and that the plaintiff was entitled to the verdict.

I am of opinion that this verdict cannot be sustained, and that the learned judge should have directed a verdict for the defendant; or at least, have left a question to the jury as to the real meaning and effect of the memorandum and the conversation taken together; and this, first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and become liable upon it, in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones; and that this agreeement is against public policy and void, as founded upon an illegal consideration. Secondly, the paper in question is no ratification, inasmuch as the act done—that is, the signature to the note—is illegal and void; and that although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void.

Many cases were cited to shew that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission; on the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and although in the paper signed by the defendant he describes the bill as bearing his own signature and Jones', I am of opinion that the true effect of the paper, taken together with the previous conversation, is, that the defendant declares to the plaintiff: "If you will forbear to prosecute Jones for the forgery of my signature, I admit and will be bound by the admission, that the signature is mine." This, therefore, was not a statement by the defendant that the signature was his, and which, being believed by the plaintiff, induced him to take the note, or in any way alter his condition; but, on the contrary, it amounted to the corrupt and illegal contract before mentioned, and worked no estoppel precluding the plaintiff from shewing the truth, which was that the signature was a forgery, and that the note was not his note.

In all the cases cited for the plaintiff the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the plaintiff to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied. But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement. Again, in the cases cited, the act done, though unauthorized at the time, was a civil act, and capable of being made good by a subsequent recognition or declaration; but no authority is to be found that an act which is itself a criminal offence is capable of ratification. The decision at nisi prius of Mr. Justice Crompton referred to in argument is inapplicable, it being uncertain whether the plaintiff in that case knew that the alleged signature of the defendant was forged, and there being no illegal contract in that case to forbear to prosecute. The same observation may be made upon the case from Ireland cited upon the authority of Mr. Justice Burton. I am therefore of opinion that the rule must be made absolute for a new trial, and that upon this evidence the jury ought to have been directed to find a verdict for the defendant, or at all events (which is enough for the purpose of this rule) that if any question should have been left to the jury it ought to have been whether the paper and the conversation taken together did not amount to the illegal agreement above mentioned. My Brothers Channell and Pigott concur in this judgment.

Rule absolute.

Attorney for plaintiff: *Willett.*
Attorneys for defendant: *Torr & Co.*

FREEMAN v. THE COMMISSIONERS OF INLAND REVENUE.

1871
Jan. 26.

74BD/67

Stamps—Transfer of Shares—Partition of Shares—55 *Geo.* 3, *c.* 184, *Sched. tit. Transfer.*

Four residuary legatees, of whom two were executors, by a deed, made in pursuance of an arrangement for specifically dividing among them certain parts of the testator's personal estate, transferred and released to one another shares in nine companies forming part of the residuary estate, so as to vest in each of the four a portion of the shares in each of eight of the companies, and in one of them all the shares in the ninth company:—

Held, that the deed required only four transfer stamps under 55 Geo. 3, c. 184, Sched. tit. Transfer.

Case stated by the Commissioners of Inland Revenue under 13 & 14 Vic. c. 97, s. 15.

The deed in question was executed for the purpose of effecting a division among the four residuary legatees under the will of G. Freeman, of railway shares in nine companies, forming part of the residuary estate. The deed was in the following form: "We, H. W. Freeman, &c., and E. Freeman, &c., the executors of the will of G. Freeman, &c., without pecuniary consideration, but in pursuance of an arrangement for specifically dividing certain parts of the personal estate of the deceased among ourselves and J. R. Freeman, &c., and S. Freeman, &c., the four residuary legatees named in the said will, do hereby, with the privity of the said J. R. Freeman and S. Freeman, *transfer and release* the undermentioned parts of such personal estate in manner hereinafter appearing; that is to say (A), to the said H. W. Freeman, to be henceforward held in his own right, and not as executor [shares in eight companies]: (B), to the said E. Freeman, to be henceforward held in his own right, and not as executor [other shares in the same eight companies]; (C), to the said J. R. Freeman [other shares in the same eight companies, and all the shares in a ninth company]; (D), to the said S. Freeman [the remaining shares in the first eight companies]. To hold the said several stocks and shares unto the said H. W., E., J. R., and S. Freeman respectively, and their respective executors, administrators, and assigns, subject to the several conditions on which we held the same at the time of the execution thereof. And we, the said H. W., E., J. R., and S. Freeman, do hereby respectively agree to take the several stocks and shares hereby expressed to be transferred to us respectively subject to the conditions aforesaid. As witness, &c." This deed was executed by all parties.

The deed was presented to the Commissioners for their decision under 13 & 14 Vict. c. 97, s. 14, stamped with a 30*s.* stamp, under 55 Geo. 3, c. 184, Sched. tit. Transfer. (1) The Commissioners required it to be stamped with thirty-three stamps as containing thirty-three separate transfers, but at the request of the parties stated this case under s. 15. The case was argued on the 14th of June, but stood over for the purpose of stating whether the executors had been registered as holders of the shares in question under s. 18 of the Companies Clauses Act. The fact that they had been so registered was supplied by affidavit.

Anstie, for the appellants. The deed is in substance a deed of partition; it deals with a fund in which all the parties have a common interest, and does nothing beyond dividing the fund among them. It is in the same position as a partition of lands occupied before 55 Geo. 3, c. 184, which was only taxable as a "deed not otherwise charged," and was for the first time specially provided for in that Act in order to meet the case where the payment of a substantial sum (not less than 300*l.*) for equality of partition made the transaction in substance, as to part of the land, a sale; in other cases it was to bear the "ordinary deed stamp" (55 Geo. 3, c. 184, Sched. tit. Partition). This shews that the fact of several distinct interests being created by a deed, does not make it taxable as containing several transactions; and the same principle is laid down in many cases where, notwithstanding the provision of 12 Anne, st. 2, c. 9, s. 24, instruments containing conveyances of several distinct interests, or containing several distinct agreements, or several separate transactions, have been held only liable to a single stamp, if the whole transaction has had a common purpose: *Thomas* v. *Bird* (1); *Goodson* v. *Forbes* (2); *Davis* v. *Williams* (3); *Baker* v. *Jardine* (4); *Allen* v. *Morrison* (5); *Doe* d. *Hartwright* v. *Fereday* (6); *Rushbrooke* v. *Hood.* (7) In *Wells* v. *Bridge* (8) a conveyance of shares by three persons to one was held to require only a single transfer stamp. That case at least shews that the number of transactions here cannot exceed four. To require a stamp in respect of the shares in each company would be no more reasonable than to require a separate stamp in respect of each article of property contained in a deed of gift. Further, since the executors are already legal holders of the shares retained by them, it is submitted there can be no stamp required in respect of those shares.

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(1) 55 Geo. 3, c. 184: Sched. tit. Transfer, after providing a fixed duty for the transfer of Bank Stock, South Sea Stock, and East India Stock on sale or otherwise, and providing (by a reference to the titles, Conveyance, Mortgage) for the duty on a transfer by way of sale or mortgage of "any share or shares in the stock of any other corporation, company, or society whatever," imposes a stamp duty of 30*s.* on the "Transfer of any share or shares in the stock and funds of any other corporation, company, or society whatever, not otherwise charged under the head of mortgage or of conveyance upon the sale of any property." See note (1) post, p. 107.

[MARTIN, B. Is this a transfer at all? It appears to me to be only an arrangement amongst the parties as to the manner in which they will divide the fund.]

It is recited to be made in pursuance of such an arrangement; and it purports to be an actual transfer.

[MARTIN, B. The words used cannot give it the operation of a transfer if it is not such in fact. This is not such a deed as is contemplated by the Companies Clauses Act, 1845, s. 14; the companies, who are entitled by s. 15 to retain the deed, would not be called on to register it.]

The deed satisfies all the requirements of s. 14, and therefore operates as a complete transfer. It is not essential that the deed should be in the form given in schedule (B), or that it should relate only to a transaction in a single company; no such objection was raised by the pleading, the argument, or the judgment in *Copeland* v. *North Eastern Ry. Co.* (9) Duplicate originals duly stamped with duplicate stamps delivered to the secretaries of the several companies will satisfy the terms of the Act.

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(1) 9 M. & W. 68.

(2) 6 Taunt. 171.

(3) 13 East, 232.

(4) 13 East, p. 235, n.

(5) 8 B. & C. 565.

(6) 12 A. & E. 23.

(7) 5 C. B. 131; 17 L. J. (C.P.) 58; 11 Jur. 931.

(8) 4 Ex. 193.

(9) 6 E. & B. 277; 2 Jur. (N.S.) 1162.

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FREEMAN v. COMMISSIONERS OF INLAND REVENUE.

Sir R. P. Collier, A. G. (*Hutton* with him), for the Commissioners of Inland Revenue. It may be conceded that the deed is a valid transfer, provided it be duly stamped; but it contains thirty-three transactions, and must bear thirty-three transfer stamps. All the cases cited were cases where several interests coalesced in one person, or several agreements were made with one person. They can go no farther than to shew that only four stamps are required. But, by the express words of the Act, there is to be a stamp on a transfer of shares in "any company." Now, here there is a transfer to each of three persons of shares in eight separate companies, and to one person of shares in nine companies. It is plain, therefore, that there are thirty-three separate transactions or transfers. This is the more clear when it is considered that there must in each company be a separate registration of each person in respect of the shares appropriated to him.

MARTIN, B. My impression is that both sides are mistaken, and that a 35*s*. stamp is the proper one. For the purpose of ascertaining with what stamp a document ought to be impressed the document ought to be looked on as what, upon the face of it, it is—that is, according to its true and proper effect, not according to the technical words which may be used in it. This is so stated and laid down by Bayley, J., in *Rex* v. *Ridgwell*. (1).

Now, I am of opinion that the view taken by Lord Campbell in *Copeland* v. *North Eastern Ry. Co.* (2), of ss. 14 and 15 of the Companies Clauses Act, 1845, is correct; and the effect of that opinion is this:—that the legislature intended that the document by which a transfer of shares was to be effected, and which was to be delivered to and kept by the company, should be a short form of deed indicating that transaction, and that alone. But if the argument addressed to us to-day is right, and this deed is a transfer, the company must, for the purpose of registering the transferees, receive and retain in their custody this deed, or, by the same reasoning, a marriage settlement, if the parties thought fit to draw it in this manner. This would involve enormous trouble; and it was, I believe, never intended by the legislature that a deed of transfer tendered for the purpose of registration to a company

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(1) 6 B. & C. 665, at p. 669.

(2) 6 E. & B. 277; 2 Jur. (N.S.) 1162.

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should deal with any other matter than the transfer of the shares in that company.

If I am right in this, the present deed is not such a deed as a company could be compelled to receive as a transfer, and the use of the word "transfer" will not subject it to the transfer stamp.

Further, I cannot see how the word "transfer" can appropriately be used with respect to the shares of which the executors were already legal owners, and which are retained by them. But assuming the deed to be as to the other shares a transfer, then I think it ought to bear seventeen transfer stamps.

KELLY, C.B. Both parties to this appeal have agreed that the deed before us is a deed by which a transfer of shares was effected at the time of its execution; and but for the doubt expressed by my Brother Martin, I should unhesitatingly have come to the same conclusion. When the precise terms of the deed are looked at it seems impossible to deny that it effects a complete and perfect transfer, having in it all that is required by the Companies Clauses Act. The two executors are at law possessed of the whole of these shares, in trust for themselves and the two other residuary legatees in equal parts. The object of the deed is to divide the fund, and to vest in each of the four the legal interest in his portion. To effect this, they mutually "release and transfer" to one another the apportioned parts of the shares; the executors transferring to each of the other two and respectively releasing to one another the legal interest, and each of the four releasing to each other the equitable interest in the shares appropriated to them respectively; thus creating in each a complete and perfect title to his own portion. It appears to me, therefore, that the parties have well considered and determined the effect of this instrument, which they have submitted to us as a deed of transfer.

The question then is, what is the proper stamp duty on this deed of transfer? Stating the question shortly, it is, how many separate and complete transactions are effected by the deed? When we look at the substance of the matter, which is what we are bound to consider, the intention and the substantial effect of the deed is, that each of the four persons entitled to these shares shall take to himself at law and in equity one-fourth part, and

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shall convey to each of the other three his interest in the portions which are to be given to them respectively, so that each may have, under and by virtue of the instrument, a complete legal and equitable interest in his portion of the shares. This is, in truth, four different transactions and no more. The number cannot in any way be multiplied, except by assuming that, if in a transaction between two persons for one consideration, several different chattels were sold (say, for instance, a horse, a watch, a necklace, a pianoforte, and a ring,) and were conveyed by deed, that deed would require five separate stamps, or a stamp for every piece of property conveyed. There is no difference between that case and the present one. Could it be said, if all the rest conveyed the whole of the shares for one consideration to one of their number, that because there happened to be shares in nine companies the deed would require nine stamps? Clearly not. The case of *Wells* v. *Bridge* (1) conclusively shews the contrary.

But it is contended that the present case differs from the case of the conveyance of chattels which I have supposed, because something remains to be done for the completion of the title of shareholder. But all that relates to the deed, including the affixing of the stamp, precedes the acts required to be done by the 15th section of the Companies Clauses Act. The stamp must be settled before any of the further steps can be taken, the company being bound before receiving the deed to see that it is duly stamped. Again, the stamp cannot be affixed until the deed is complete; everything must be done necessary to entitle the parties to call upon the commissioners to adjudicate upon the stamp, before the question can arise for their decision. What, therefore, is done afterwards is quite independent of the deed; and unless there were some express provision making everything inoperative unless these further acts were done, we must treat the deed as complete and effectual in itself so far as its proper object, the conveyance of the interests dealt with, is concerned. Now, if all the Act required was that a copy of the deed should be left with the company, no such difficulty as is suggested could arise. But a difficulty is supposed to arise because the Act directs that the deed itself, duly stamped, shall be left with the company, which can only be effected in the present case by the multiplication of duplicates. The use of duplicate originals is, however, a common practice in many cases; and if one deed is stamped with the proper transfer stamp, and duplicate deeds are stamped with the stamp provided by the Act in the case of duplicates, are not those duplicate deeds "duly stamped" within the meaning of s. 14? But that is a point we need not decide. As to the present question, I have already said that the deed appears to me to contain four transactions; but if it were merely doubtful whether there were more, we ought not, in a case of taxation, to multiply the number of stamps required beyond what is clear and certain.

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(1) 4 Ex. 193.

Pigott, B. I agree that there ought to be four transfer stamps on this deed, and four only. It is in effect a deed relating to four distinct transfers, by means of which each of the four parties obtains a distinct and separate interest; and no one of them could obtain such an interest without the concurrence of all the others. We ought not to multiply the duties if there is any doubt upon the point.

Upon the question of whether the companies will be bound to register this deed, I have some doubt; but it is not necessary to decide the point, and if decided in the negative it would not assist the stamp office.

Judgment that the deed should bear four transfer stamps. (1)

Attorneys for appellants: *Duignan, Lewis & Lewis.*
Attorney for Commissioners: *Solicitor of Inland Revenue.*

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(1) By 33 & 34 Vict. c. 99, all the earlier Stamp Acts are repealed, and by 33 & 34 Vict. c. 97, the law as to stamps is consolidated. In the schedule to the latter Act, the head "Conveyance or Transfer, whether on sale or otherwise," continues the old duties on the transfer of Bank Stock and East India Stock, and imposes a duty of 2*s.* 6*d.* for every 100*l.* of "debenture stock or funded debt of any corporation or company" transferred. The next title imposes an ad valorem duty on the "Conveyance or Transfer on sale of any property (except such stock or debenture stock, or funded debt as aforesaid)." The title "Conveyance or Transfer by way of security" refers to the title Mortgage. Lastly, a duty of 10*s.* is imposed on any "Conveyance or Transfer of any kind not hereinbefore described."

By s. 7, subs. 2, "If more than one instrument be written upon the same piece of material, every one of such instruments is to be separately

1871
Jan. 31.

THE BRITISH & AMERICAN TELEGRAPH COMPANY, LIMITED, *v.* COLSON.

Company—Allotment of Shares—Letter of Allotment posted but not received.

13 Eq 151-3
154
— 480
HL. 565

The defendant applied for shares in the plaintiffs' company; shares were allotted to him, and a letter of allotment was posted to his address, but was never received by him:—

Held, that the defendant was not a shareholder.

Dunlop v. *Higgins* (1 H. L. C. 381) commented on.

Overruled 4 Ex D 216

Contrast L.R. 7 Ch 587, 590, 592-5, 7

5 Eq 18-9
21-4
App Cas 671.
2 Ex D 221-2
225-8 230
232-7

Action for a sum of money alleged to be due from the defendant to the plaintiffs, on an allotment of shares in their company. The first count stated a promise by the defendant that, in consideration the plaintiffs would allot him fifty shares, he would pay 2*l.* upon each of the said shares, and alleged the performance of conditions precedent, and breach by non-payment. In the second count the defendant was sued as a shareholder of fifty shares, for a call of 2*l.* due thereon, with interest.

The defendant (amongst other pleas) pleaded to the first count, denial of the allotment; to the second count, never indebted.

Issue.

The cause was tried before Bramwell, B., at Westminster, on the 28th of June, 1870. It was proved that the defendant on the 13th of February, 1867, sent an application to the plaintiffs for fifty shares, the letter of application containing an undertaking "to pay on allotment the deposit of 2*l.* per share;" that on the 14th, fifty shares were allotted to him at a meeting of directors, and notice of the allotment posted to his address (31 Charlotte Street, Fitzroy Square); and that his name was entered on the register as holder of the fifty shares.

The defendant, however, swore that he had never received the notice; that another person of the same name lived opposite to him in the same street; that about that time the numbers in the

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and distinctly stamped with the duty with which it is chargeable.

By s. 8, subs. 1, "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters."

These two provisions correspond to s. 24 of the Act of 12 Anne, st. 2, c. 9, repealed (under the title of 13 Anne, c. 18) by 33 & 34 Vict. c. 99.

Overruled Household Fire v Grant
4 Ex D. 216

street were changed (his own number being changed from 31 to 87), and that several letters then sent to him had never reached him.

On the 28th of February the plaintiffs, on being informed that the notice had not reached the defendant, sent him a duplicate notice, which he refused to accept.

The jury found that the letter of allotment was posted to the defendant on the 14th of February, but that he never received it; and that the second notice was not sent in reasonable time. The learned judge, acting on *Dunlop* v. *Higgins* (1), thereupon directed the verdict to be entered for the plaintiffs; reserving leave to the defendant to move to enter the verdict for him, upon the authority of *Finucane's Case.* (2) A rule having been obtained accordingly,

Nov. 17. *Pollock, Q.C.*, and *Lewis*, shewed cause. The case is concluded by the authority of *Dunlop* v. *Higgins* (1), which shews that a contract is completed by the posting of a letter accepting the offer. The same doctrine was recognized in *Duncan* v. *Topham* (3), which is directly in point, because there the letter of acceptance never reached its destination. In *Finucane's Case* (2) neither of these cases was cited, and the case is not a considered one.

[They proceeded to argue upon some clauses of the company's articles of association, but the Court observed that if the defendant was not in fact a shareholder, he could not be bound by them.]

Gill, in support of the rule. *Finucane's Case* (4) lays down a sensible rule, namely, that if the defendant not only denies receipt of a posted notice, but also gives a reasonable account of its not reaching him, he will not be liable as if he had received it. The defendant has here satisfied that condition. In *Duncan* v. *Topham* (1), the point was not argued at length; the case of *Harvey* v. *Johnston* (2), there referred to, is no authority on the question; and the point now suggested was not raised. It was laid down by Wood, V.C., in *Fletcher's Case* (3), that to complete a shareholder's contract it is necessary "that the allotment should be communicated and acquiesced in." It is true the point did not arise there; but in *Hebb's Case* (4), where, after the allotment had been made, but before it was communicated to the applicant, he withdrew his application, it was held that this was no contract to accept the shares.

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(1) 1 H. L. C. 381.

(2) 17 W. R. 813.

(3) 8 C. B. 225; 18 L. J. (C.P.) 310.

(4) 17 W. R. 813. In *Reidpath's Case* (Law Rep. 11 Eq. 86), (which occurred in the winding-up of the same company, the Constantinople and Alexandria Hotels Company), Lord Romilly, M.R., again decided this point. There it was proved that a letter of allotment, and, subsequently, letters requiring payment of the allotment call and threatening legal proceedings, were posted to Reidpath's address; but Reidpath, though he admitted that he had continued to reside at the address given by him to the company, and stated nothing to account for the letters not reaching him, denied that he had ever received any of them. Lord Romilly, M.R., said (at p. 89), "It is admitted that there are three things which constitute the contract, the application for shares, the allotment of shares, and the notice of allotment. The two first it is not necessary to consider in this case; but who ought to prove the notice of the allotment? I apprehend the com-

Cur. adv. vult.

Jan. 31. The following judgments were delivered:—

KELLY, C.B. This was an action to recover 100*l.*, or 2*l.* per share upon fifty shares in the above company. The defendant denied his liability, and the question reserved at the trial is, whether the plaintiffs are entitled to recover or not.

On the 13th of February the defendant applied to the plaintiffs for fifty shares in the company, by the following letter:—"To the directors of the British and American Telegraph Company Limited.—Gentlemen,—I request that you will allot me fifty shares in the above company, subject to the memorandum and

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pany ought to prove that. Does the fact of putting the notice in the post-office sufficiently prove it? I find no case which has laid down that rule, and the cases referred to do not amount to it. I do not think I should be at liberty so to hold in opposition to the distinct and positive oath of the respondent, who says he never received the letters. In this state of circumstances I cannot fix him as a contributory." The latter part of these observations, relating to the conclusion of fact, appears to go only to the question of the weight of evidence, and not to lay down any general rule.

(1) 8 C. B. 225; 18 L. J. (C.P.) 310.

(2) 6 C. B. 295; 17 L. J. (C.P.) 298, cited in *Duncan* v. *Topham* as 7 C. B. 295.

(3) 37 L. J. (Ch.) at p. 50.

(4) Law Rep. 4 Eq. 9. The letter of allotment there was sent to the company's agent for delivery to the applicant, but was not delivered to the applicant till after his retractation.

articles of association, and I hereby agree to become a member of the company in respect of such shares, or in respect of any less number you may allot me, and to pay on allotment the deposit of 2*l.* per share thereon; and I request that my name may be placed on the register of members for the shares so allotted."

To which, on the 14th of February, the plaintiffs replied, through their secretary, by the following letter of allotment:—"British and American Telegraph Company Limited.—Sir,—The directors having considered your application, have allotted you fifty shares in this company, and I have to request that you will pay the sum of 100*l.*, being an allotment deposit of 2*l.* per share, on or before Wednesday the 20th instant, to the account of the company, either at Messrs. Dimsdale, Drewitt, Fowler, & Barnard, Bankers, 50 Cornhill, E.C., or at the London and County Bank, Lombard Street."

This letter was put into the post on the 14th of February, and should have reached the defendant on the following day, but from some confusion arising from the manner in which the houses were numbered in the street in which the defendant resided, the letter was not delivered to him. A fortnight afterwards, upon some communication between the parties, the letter of allotment first became known to the defendant, and the jury have found that this was not within a reasonable time. The learned judge, upon the authority of the case of *Dunlop* v. *Higgins* (1), directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter a nonsuit; and I am of opinion that the rule should be made absolute.

It appears to me, that if one proposes to another, by a letter through the post, to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter, and the letter put into the post, the party having proposed the contract is not bound by the acceptance of it until the letter of acceptance is delivered to him or otherwise brought to his knowledge, except (in some cases) where the non-receipt of the acceptance has been occasioned by his own act or default.

The consequences, if the law were as contended for on the part

(1) 1 H. L. C. 381.

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British and American Telegraph Company v. Colson.

of the plaintiffs, would be such as to work great and obvious injustice in a variety of mercantile transactions of constant occurrence. A merchant in London writes to another merchant at Bristol offering to sell him a quantity of merchandise at the price of 1000*l*., and the Bristol merchant by return of post accepts the offer and agrees to become the purchaser; but the letter miscarries and is never received. Would the Bristol merchant be entitled a week afterwards to bring an action for the non-delivery of the goods, when the London merchant, from having received no answer to his letter, has sold them to another person? Then, suppose that A., a stockbroker in London, who has been in the habit of making purchases of stock for B. in Liverpool, writes to B. on the 1st of January, "I can offer you 10,000*l*. in 5-20 bonds at 90, but I must require your answer by return of post." B., receives the letter at Liverpool on the morning of the 2nd, and writes by the post of that night to A. in London, "I accept the 10,000*l*. 5-20 bonds at 90, and request you will hold them for me until further instructions;" the letter by some accident miscarries and never reaches the hands of A., who, receiving no reply throughout the 3rd of January, sells the stock on the morning of the 4th to another purchaser. B. applies to him ten days after, when the stock has risen 50 per cent., and directs him to sell. If the putting of the letter into the post by B. at Liverpool on the 2nd is equivalent to the delivery of it to A. on the 3rd, B. is entitled to maintain an action as if it had been delivered, and recover the 50 per cent. upon the stock. It is absolutely impossible that such can be the law of this country. Numberless cases of this nature might be put, in which the principle which regulates the making of contracts among mercantile men would be set at nought, if the law be as contended for on the part of the plaintiffs; that principle being that a contract is complete only when a proposal is made by one party, accepted by the other, and the acceptance notified to the maker of the proposal.

The learned judge in this case directed a verdict for the plaintiffs chiefly, if not wholly, upon the authority of *Dunlop* v. *Higgins* (1). But it will be found that this case is no authority at all for the proposition contended for by the plaintiffs, that the

(1) 1 H. L. C. 381.

putting a letter into the post accepting a contract is equivalent to the delivery of the letter to the person written to, and binds him by the acceptance although it should never have been delivered. The facts of the case of *Dunlop* v. *Higgins* (1) were these: on the 28th of January, Dunlop & Co., merchants at Glasgow, wrote to Higgins at Liverpool, and put the letter in the post, offering to sell to him 1000 tons of iron at 65*s*. This letter was delivered at Liverpool to Higgins at 8 A.M. of the 30th of January; the first post for Glasgow left Liverpool on that day at 3 P.M., and the second at 1 A.M. of the 31st. Higgins wrote a letter on the same day, the 30th, accepting the iron, and put it into the post during business hours on that day, that is to say, a little after 3 P.M., which it was not denied was in proper time. This letter should have been delivered in Glasgow about 8 A.M. on the 1st of February, but owing to the bad state of the roads, there being a railway only for a part of the journey, the mail did not arrive at Glasgow till some hours later, and the letter was not delivered to Dunlop & Co. till about 2 P.M. They afterwards renounced the contract, on the ground that the acceptance had not reached them at 8 P.M., and alleging that in the meantime they had sold the iron to another purchaser. Higgins, thereupon, brought his action for the non-delivery of the iron pursuant to the contract, and he was held entitled to recover. In this decision of the Court of Session, and the affirmance of it by the House of Lords, I entirely concur, on the plain ground that the acceptance of the contract reached Dunlop & Co. in time; and the judgment which I am about to pronounce is in perfect accordance with it.

It is said, however, that the ground upon which this case was decided was, that the contract was complete and binding upon Dunlop & Co., not upon the acceptance of it by Higgins coming to hand, but upon the putting of the letter into the post by Higgins upon the 30th of January; and it is further insisted that Lord Cottenham laid it down as law, that the putting of a letter into the post accepting a contract is equivalent to the delivery of that letter, although it should never in fact be delivered at all to the person to whom it is addressed.

No such proposition was laid down by Lord Cottenham, or by any other judge, either in the Court of Session or in the House of Lords. The points, indeed, that were taken in argument seem to be quite apart from any just legal view of the case. It was insisted by Dunlop & Co. that, Higgins' letter of acceptance being by mistake dated on the 31st, they had a right to assume, and Higgins had no right to disprove, that it was actually written on the day, and so too late to bind them to the contract. But this objection to the action was rightly overruled in the House of Lords; and it was held that Higgins was at liberty to shew, as the fact was, that the letter was written and put into the post on the 30th. It was undoubtedly argued, that the putting of the letter into the post by Higgins on the 30th amounted then and at once to an acceptance of the contract binding upon Dunlop & Co., without reference to the time at which it was delivered, or even if it had never been delivered at all; and upon this point Lord Cottenham treats it as a question of fact, whether the posting of the letter by Higgins on the 30th was or was not a compliance with the duty of the party. He rightly holds that it was; and in his judgment he observes, not that the posting of a letter is equivalent to its delivery; no such doctrine is to be found throughout his Lordship's judgment; but that Higgins was not responsible for the delivery according to the course of the post by the post-office, over which he had no control. And this, no doubt, is true; not merely as a general, though somewhat vague and indefinite proposition, but as strictly applicable to the facts of that case, Higgins having been in no wise responsible for the letter, which he posted at Liverpool at a little after 3 p.m. on the 30th, not having reached Glasgow until 2 p.m. instead of 8 a.m. on the 1st of February. This, however, is very different from the proposition that the contract was completed and binding upon Dunlop & Co., not by the delivery to him of the letter of acceptance on the 1st of February, but by the putting it into the post by Higgins at Liverpool on the 30th. Nothing like this was ever said or suggested by Lord Cottenham, or any other judge, and the supposition that such had been the decision of the House of Lords is only to be accounted for by the vague and inaccurate terms of the marginal note to the report of the case.

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(1) 1 H. L. C. 381.

The other case relied upon for the plaintiffs is *Duncan* v. *Top-*

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ham. (1) There, in an action for non-delivery of goods purchased, in which the contract was alleged to be, to deliver within a reasonable time, the proof was of a contract "that the goods must be put on board directly;" and the judge at the trial having ruled that this evidence supported the declaration, the defendant obtained a rule for a new trial on the ground of variance, and the rule was afterwards made absolute. This decision, therefore, has no application to the present case; but it certainly appears that, upon the trial of the cause, Mr. Justice Cresswell had directed the jury that the contract was complete on the posting of the plaintiff's letter accepting the offer of the goods, notwithstanding it might never have come to the defendant's hands. It does not appear how far this ruling was material in the cause; but, the counsel for the defendant having referred to it as one of the grounds upon which he claimed a rule nisi for a new trial, no express judgment is given upon that point; but upon the statement of it Maule, J., observed, "I think it was the mode of proof in *Harvey* v. *Johnston.*" (2) And Wilde, C.J., observed, "There is also a case of *Dunlop* v. *Higgins* (3), in the House of Lords, where the same point was decided." Now, upon looking at the case of *Harvey* v. *Johnston* (2), it will be found that no such point arises, and that the decision had no relation to any such question; and all that appears is, that upon an argument as to whether an offer made can be retracted at any time before acceptance, Wilde, C.J., observed, "An order for goods is binding upon the party sending it before the letter accepting the contract is received by him." This case, therefore, of *Harvey* v. *Johnston* (2), is no authority whatever in support of the proposition contended for; nor, for the reasons before assigned, is the case of *Dunlop* v. *Higgins.* (3) All that fell from the Court, therefore, in *Duncan* v. *Topham* (1), as far as relates to this point, is founded entirely on an erroneous reference by two of the judges to these two cases. There is certainly the opinion of Mr. Justice Cresswell at nisi prius, which seems to support this doctrine; but I cannot accede to it, notwithstanding the high authority of that learned judge.

It may be that in general, though not in all cases, a contract

4 Ex D 221

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(1) 8 C. B. 225; 18 L. J. (C.P.) 310. (2) 6 C. B. 295; 17 L. J. (C.P.) 298.
(3) 1 H. L. C. 381.

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4 Ex D 221

takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the Court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter. And to this effect is *Potter* v. *Sanders*. (1) And hence, perhaps, the mistake has arisen that the contract is binding upon both parties at the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified.

On the other hand, the authorities are numerous to shew that a contract is not complete until the acceptance of it is made known by the one party to the other. In *Pellatt's Case* (2) Lord Cairns, and Turner, L.JJ., lay it down that, upon an application for shares to be allotted, the registration of the shares by the company does not make the applicant a shareholder; and Lord Cairns expressly says (3), "I cannot, therefore, consider an application for shares, followed by registration not communicated to Mr. Pellatt, to constitute a completed contract."

In *Gunn's Case* (4) it was held by Stuart, V.C., and confirmed on appeal by Rolt, L.J., that upon an application for shares, and on allotment and registration of shares in the name of the applicant, he does not become a shareholder unless he has notice of the allotment; and the Lord Justice, in his judgment, treats an application for an allotment of shares and an ordinary commercial contract as identical. His language (5) is directly applicable to the present case; "There must be the consent of two parties to a contract. One man may make an offer to another and say, 'I agree to buy your estate;' but the person to whom he has made this offer must say: 'I agree to sell you the estate,' or he must do something equivalent to an acceptance, something which satisfies the Court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer."

Sahlgreen & Carrall's Case (6) is to the same effect. There, where there had been a contract to accept shares on allotment of shares, and the allotment had been made but not communicated, Lord Cairns, L.J., observes (1), "But to complete this appropriation, to make it binding upon Sahlgreen & Carrall, to make them equitable owners of the shares, and to entitle the company to enter them on the register, it was necessary that they should be informed of what was done, and, until notice was given to them, there was no binding appropriation which could make them owners of any shares." *Hebb's Case* (2), cited in argument, is to the same effect.

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(1) 6 Hare, 1.

(2) Law Rep. 2 Ch. 527.

(3) Law Rep. 2 Ch. at p. 535.

(4) Law Rep. 3 Ch. 40.

(5) Law Rep. 3 Ch. at pp. 43-44.

(6) Law Rep. 3 Ch. 323.

Upon these grounds, therefore, I am of opinion that the action is not maintainable, and that the rule to enter a verdict for the defendant must be made absolute.

In this judgment my Brother Pigott agrees.

BRAMWELL, B. In this case the material facts are, that the defendant applied to the plaintiffs to have shares in their company allotted to him; that shares accordingly were allotted to him; that the plaintiffs wrote and posted in due time a letter to him informing him thereof, but that the letter never reached him.

The question is, if he by these means became a shareholder and liable to pay a deposit which by his letter of application he undertook to pay on allotment. The plaintiffs say he did, by the mere posting of the letter; the defendant says that was not enough, that he was entitled to know if his offer to become a shareholder was accepted, and that posting the letter to him is not equivalent to giving him that notice. The plaintiffs, admitting in a sense that he was entitled to know, say, that posting a letter containing a notice that his offer was accepted and shares had been allotted to him was sufficient. Both parties agree that shareholdership is constituted by a contract between the company and the intending shareholder; both agree that for an offer to enter into a contract to be binding on the offeror, the person to whom it is made must give the offeror notice that he accepts it; and both agree that if the plaintiffs had not availed themselves of the post, but had sent their letter by hand and the messenger had not delivered it, there would have been no acceptance of the defendant's offer.

But the plaintiffs say that it is different in the case of the public post. Why it should be, no reason is given. If it is in this case,

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(1) Law Rep. 3 Ch. at p. 327.

(2) Law Rep. 4 Eq. 9.

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it must be because it is so as a general rule. That is to say, there is nothing peculiar in this case; there is nothing peculiar in applications for shares and in the acceptance of the application. To hold, therefore, that the plaintiffs are right, it seems to me that we must lay it down as a general proposition, that in cases where the post may be used, wherever a person posts a letter, he does that which is equivalent to delivering it to the person to whom it is directed. So that if an offer is made by letter, and a letter is posted accepting it, the offeror is bound. That if a man orders his broker to buy stock or shares, and hold them to the orders of the principal, and the principal posts a letter ordering the broker to sell, the broker not selling would be liable to damages, though the letter never reached him. So of a warehouseman bound to forward goods on an order from their owner; so of a notice to quit; so if a man proposed marriage, and the woman was to consult her friends and let him know, would it be enough if she wrote and posted a letter which never reached him? I put this case, not to raise a smile, but to shew an extravagant consequence of such a general rule.

In all the cases I have put it would be extremely hard to make liable the person who had never received the letter; it would be wholly unjust and unreasonable. It may be said that it would be hard to leave the sender of the letter without remedy. But there is this to be said; the sender of the letter need not use the public post. If he does, he may guard against mistake by sending two letters, or requesting an answer and sending another on non-receipt of the answer, or by taking other steps to ascertain the arrival or non-arrival of the letter, and to remedy the mischief of the latter event. But the person to whom it is addressed can do absolutely nothing; for by the hypothesis he does not know it has been sent.

When these considerations are borne in mind, when it is remembered that it is open to the sender to adopt other means of sending, when it is certain that if he does he is responsible for the due arrival of the letter, it seems to me right to hold that as a rule the post is the agent of the sender of a letter, and that the delivery of a letter to the post not followed by delivery by the post to the person to whom it is sent, is no delivery to the latter, and has no more effect than if the letter had been given to a hand messenger and not delivered, or had been kept in the pocket of the sender. In the absence of authority, therefore, I should hold, and confidently hold, that in this case the defendant's offer had not been accepted, and that he was not liable. Of course if the person addressed had agreed that posting a letter should suffice, like a delivery of goods to a carrier, he would be bound. But it seems to me that when nothing more appears than that the post may be resorted to, the mere posting should not bind the person written to; because, in all cases, unless the contrary appears by express stipulation, the post may be resorted to. If it should be argued that convenience requires such a rule, as otherwise persons might untruly deny the receipt of letters, the answer is, that if such a rule prevailed persons would untruly assert the posting of them.

But there are many authorities that it is necessary to examine; the first and most important is *Dunlop* v. *Higgins.* (1)

The short facts of that case are, that Dunlop at Glasgow had made an offer by post to Higgins at Liverpool; that Higgins was bound, according to the usual practice of merchants, to post his answer of acceptance on a certain day, the 30th of January; that Higgins did on that day post an answer accepting the offer; that in ordinary course of post that letter would reach Glasgow at 8 A.M., the 1st of February; but that, owing to the slippery state of the roads, the train at Warrington was missed by the postman from Liverpool, and the letter was not delivered to Dunlop till the next delivery at 2 P.M.; it was held he was bound. Now, one might say of this case, that it was on an appeal from Scotland, and perhaps not intrinsically binding on us. But it certainly was not dealt with by Lord Cottenham as a question of Scotch law. It may also be justified on this ground; the parties by their correspondence recognize the post as a proper medium of communication; then that must be subject to inevitable circumstances. I do not say *accidents*, because the delay was occasioned by frost. And, certainly, it would seem strange that if the ordinary delivery of letters was at ten, and a frost or fog delayed the delivery till eleven, the person receiving the letter could say he was not bound.

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(1) 1 H. L. C. 381.

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If the answer were to be sent by hand, surely it would be enough to send it by hand as fast as the state of the roads would admit. The difficulty of the case is not so much its facts, as what Lord Cottenham said. He seems to me correctly represented in the head-note,—"a contract is accepted by the posting of a letter declaring its acceptance." He says (1), "Then comes the question, whether under those circumstances, that, by the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course." He speaks of an "accident." He further says (2), "If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control?" . . . "It is not disputed—it is a very frequent occurrence, that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." It seems to me that the correct way to deal with these expressions is, to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs here contend for; but that, where the post may be used between two parties, it must be subject to those delays which are unavoidable.

The next case is *Duncan* v. *Topham* (3), that certainly is directly in favour of the plaintiffs as reported in the Common Bench Reports. But I doubt the accuracy of that report. The point is not mentioned in the report in the Law Journal (4), and in the report in 8 C. B. at

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(1) 1 H. L. C. at p. 397.

(2) 1 H. L. C. at p. 398.

(3) 8 C. B. 225.

(4) 18 L. J. (C.P.) 310.

p. 232, Maule, J., refers to a case of *Harvey* v. *Johnston,* mentioned in the report as 7 C. B. 295, but really 6 C. B. 295. That case was an action for breach of promise of marriage, and the evidence of acceptance of the offer was, the plaintiff's going to the place where she was to be married; and in *Duncan* v. *Topham* (1) the plaintiff accepted the offer by sending off the goods as desired; and see per Cresswell, J., 6 C. B. at p. 304. So that it may be that the Court refused the rule, not on the ground that the posting of the letter, without delivery, was a sufficient acceptance of the offer, but on the ground that the sending of the goods was sufficient. Still there is the opinion of Mr. Justice Cresswell at nisi prius in support of the now plaintiffs' contention. There is also the case of *Potter* v. *Sanders* (2), before Wigram, V.C., who held that a contract for the sale of an estate was made when the letter containing the acceptance of an offer was posted. It arrived; and he says that the vendor by posting did an act which, unless interrupted, concluded the contract between himself and the plaintiff. But, as I have observed, the letter did arrive, and the sender was bound by it, and necessarily bound from its date, and could not, therefore, after he had sent it and before its arrival, make a contract for the sale of the same land with a third person. Perhaps this case, therefore, does not prove much. There are also two cases before Lord Romilly: *Finucane's Case* (3) and *Hebb's Case* (4). In the former, he held that posting a letter of allotment which had not been received was not sufficient. It is true that there had been laches in the company, but Lord Romilly does not seem, as far as can be guessed by the short note, to have decided the case on that ground. In the latter case he says (5), "*Dunlop* v. *Higgins* decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." He certainly seems, therefore, to understand that case in the sense the plaintiffs here contend for. (6)

As to the cases where it had been held that notice of dishonour is duly given if the letter is posted, one may say that is a positive mercantile rule peculiar to such cases. Alderson, B., says in *Stocken* v. *Collin* (1), "If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission."

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(1) 8 C. B. 225; 18 L. J. (C.P.) 310.

(2) 6 Hare, 1.

(3) 17 W. R. 813.

(4) Law Rep. 4 Eq. 9.

(5) Law Rep. 4 Eq. at p. 12.

(6) See, however, *Reidpath's Case* (Law Rep. 11 Eq. 86), cited ante, p. 109, note.

Still, these cases are rather in favour of the plaintiffs than otherwise. *Adams* v. *Lindsell* (2) seems to have nothing to do with the question. A misdirected letter was considered as rightly delivered on the day it was delivered in fact, so as to enable the receiver to act on it. The practice, also, that in proving a letter the posting only is shewn, may be relied on. But that is because it must be presumed, till the contrary is shewn, that a public establishment such as the post-office has done its duty.

On this review of the authorities they cannot be said to be conclusive either way. I am left, therefore, at liberty to act on my own judgment, and as I entertain a strong opinion in favour of the defendant on principle, and the Lord Chief Baron and my Brother Pigott are of opinion in favour of the defendant, I think we ought to make the rule absolute to enter a verdict for him.

Rule absolute.

Attorneys for plaintiffs: *Lewis, Munns, & Co.*

Attorneys for defendant: *Hathaway & Andrews.*

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(1) 7 M. & W. at p. 516.

(2) 1 B. & A. 681.

[IN THE EXCHEQUER CHAMBER.]

HOLMES *v.* NORTH EASTERN RAILWAY COMPANY.

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Feb. 10.

10 Q.B. 298
300 — 1
1 Q.B.D. 253-4
255, -6, 7

Negligence—Licensee—Invitation—Customer.

At the defendants' station at C. it was the practice to unload coal waggons by shunting them, and tipping the coal into cells; it was also the practice for the consignees of the coal or their servants to assist in the unloading, and for that purpose to go along a flagged path by the side of the waggons. The plaintiff was consignee of a coal waggon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station-master, he went to his waggon, which was shunted in the usual place, took some coal from the top of the waggon, and descended on to the flagged path. The flag he stepped on gave way, and he fell into one of the cells, and was injured:—

Held (affirming the judgment of the Court below), that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged, with the consent of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition.

Appeal from the decision of the Court of Exchequer (1) discharging a rule obtained by the defendants to enter a verdict for them on the ground that there was no evidence of negligence in them causing the injury to the plaintiff complained of.

Manisty, Q.C. (*Kemplay* with him), for the defendants.

Bohn, for the plaintiff, was not called upon.

The Court (Cockburn, C.J., Willes, Keating, Mellor, Montague Smith, Lush, Brett, JJ.), affirmed the judgment, for the reasons given by the Court of Exchequer.

Judgment affirmed.

Attorneys for plaintiff: *Doyle & Edwards, for Nixon, Darlington.*

Attorneys for defendants: *Williamson & Hill.*

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(1) Reported Law Rep. 4 Ex. 254.

1871
Feb. 14.

13 Eq 160
9 Ex 253.
ChD 309

WALTER v. JAMES.

Payment of Debt by Stranger—Discharge of Debtor—Ratification.

The defendant being indebted to the plaintiff, S. who had acted as his attorney in the matter of the plaintiff's claim (the amount of which was disputed) but whose authority had been countermanded, paid to the plaintiff 60*l.* in discharge of the disputed claim. The plaintiff afterwards, at the request of S., and before any ratification by the defendant, repaid to S. the 60*l.*, and sued the defendant for the debt. The defendant pleaded as to 60*l.* payment, and relied upon the payment made by S.:—

Held, that it was competent to the plaintiff and S., before ratification by the defendant, to cancel what they had done, and that the plea of payment was therefore not proved.

Action on an attorney's bill, amounting to 63*l.* 17*s.* 3*d.* The defendant paid into Court 3*l.* 17*s.* 3*d.*, and to the residue pleaded payment.

The cause was tried before Mellor, J., at the Gloucestershire Summer Assizes, 1870. It appeared at the trial that the plaintiff had a claim against the defendant for professional services; that Southall, acting as the defendant's attorney, had been concerned in negociation with the plaintiff in respect of this claim, and had induced him to accept 60*l.* in discharge of it; that Southall had been instructed by defendant to pay that sum to plaintiff, but that before paying it those instructions had been countermanded, and he had ceased to act as defendant's attorney; that, nevertheless, considering himself under a moral obligation to the plaintiff to see him paid, he subsequently did pay the 60*l.*, and paid it, as he stated in evidence, in discharge of plaintiff's claim upon defendant; but that afterwards, and before any act of defendant assenting to or adopting the payment, he requested plaintiff to return him the money, which was accordingly done. It was left in some doubt on the evidence whether Southall did or did not inform plaintiff, at the time of paying him, that he had ceased to act as defendant's attorney. No evidence was given of any adoption of the payment by defendant before plea.

The learned judge ruled that the defendant could take advantage of the payment by Southall, and a verdict was entered for the defendant, with leave to the plaintiff to move to enter the verdict for him, the Court to have power to draw inferences of fact. A rule having been obtained accordingly, Jan. 20. *Cave* (*Huddleston, Q.C.*, with him) shewed cause. The payment by Southall to plaintiff, being made and accepted as an absolute discharge of defendant's debt, did, in fact, discharge the defendant, and his liability could not afterwards be restored. In Fitz. Abr. tit. Barre, pl. 166, it is said: "If a stranger does trespass to me, and one of his relations, or any other, give anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied, Quod tota curia concessit."

[MARTIN, B. That only shews that the trespasser may take advantage of the payment, which is clear; he adopts and ratifies the act, and makes it a good accord and satisfaction between himself and the plaintiff.]

Nothing is said as to the necessity of an express ratification by the defendant; only the plaintiff's consent is insisted upon. To the same effect is Co. Litt. 206 (b), where it is said that if a stranger, in the name of the mortgagor or his heir, tender the mortgage money, "and the mortgagee accepteth it, this is a good satisfaction."

[MARTIN, B. The conclusion of the sentence shews the assent of the mortgagor to be necessary: "the mortgagor or his heir *agreeing thereunto* may re-enter into the land; omnis ratihabitio retrotrahitur et mandato æquiparatur. But the mortgagor or his heir may disagree thereunto if he will."]

In the Roman law the rule prevailed that payment to the creditor by a stranger discharged the debtor from liability, although the debtor was ignorant of, or even dissented from, the act, Inst. Lib. 3, tit. 29, 1, and that rule is not opposed to any authority in the English law; the dictum to the contrary, in *Jones* v. *Broadhurst* (1) being, as pointed out by Willes, J., in *Cook* v. *Lister* (2), not necessary to the decision of the case. The cases of *Belshaw* v. *Bush* (3) and *Cook* v. *Lister* (2) practically reduce the decision in *Jones* v. *Broadhurst* (1) to a question of pleading, and shew that a payment made by a third person may be adopted by the debtor, so as to discharge him from liability; and *Simpson* v. *Eggington* (4) shews that such a payment may be adopted by plea, even though

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(1) 9 C. B. 173.

(2) 13 C. B. (N.S.) 543, at p. 594; 32 L. J. (C.P.) 121, at p. 126.

(3) 11 C. B. 191; 22 L. J. (C.P.) 24.

(4) 10 Ex. 845; 24 L. J. (Ex.) 312.

17/ma 67.

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it has been previously repudiated. That case is stronger than the present, for here there has been no repudiation by the defendant; his refusal to allow Southall to pay the plaintiff out of his moneys is no evidence of an unwillingness that Southall should pay him out of his own. The only difficulty attaching to the rule contended for is, that it is said the contractual relation existing between the parties cannot be altered except by mutual consent. But the payment being for the benefit of the debtor, his consent must be presumed until the contrary is shewn; here not only is the contrary not shewn, but he expressly adopts and ratifies it. In *Lucas* v. *Wilkinson* (1), the decision seems to have turned on the question whether Morris paid the bond out of the defendant's moneys.

Henry James, Q.C., and *Griffits*, in support of the rule. To maintain the defendant's position, it must be contended that even if the defendant adopted Southall's payment, Southall would have no remedy against him; otherwise the payment could not be presumed to be for his benefit, it would only make Southall his creditor instead of the plaintiff. But it is not to be supposed that Southall intended a gift to the defendant; a payment made without consideration can ordinarily be recovered back, and the intention to give must be proved; the payment was intended to discharge the defendant, because it was expected that defendant would ratify it; but before any ratification, and therefore before the discharge was completed, the transaction was undone and the money returned. The law is expressly laid down in *Jones* v. *Broadhurst* (2); *Belshaw* v. *Bush* (3); *Simpson* v. *Eggington* (4); *Bird* v. *Brown* (5); *Kemp* v. *Balls* (6); and *Lucas* v. *Wilkinson* (1), that payment by a third person "is not sufficient to discharge a debtor, unless it is made by the third person as agent for and on account of the debtor with his prior authority or subsequent ratification." (7) The briefly reported resolution cited from Fitzherbert is opposed to this view; it does not negative the necessity of the stranger's assent; on the contrary, it implies his actual ratification; and it is merely begging the question to say that if the plaintiff here recovers he will be "again satisfied."

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(1) 1 H. & N. 420; 26 L.J. (Ex.) 13.

(2) 9 C. B. 173.

(3) 11 C. B. 191; 22 L. J. (C.P.) 24.

(4) 10 Ex. 845; 24 L. J. (Ex.) 312.

(5) 4 Ex. 786, at pp. 798-9; 19 L. J. (Ex.) 154, at p. 157.

(6) 10 Ex. 607; 24 L. J. (Ex.) 47.

(7) 10 Ex. at p. 847.

(3) s/c 17 Jur. 67.

Cur. adv. vult.

Feb. 14. The following judgments were delivered:—

KELLY, C.B. [after stating the facts of the case, proceeded:—] Southall, therefore, in paying the debt appeared to act as the defendant's agent; but it turned out afterwards that, although he had originally been authorized by the defendant to come to an arrangement with the plaintiff, and to make this payment, that authority had been revoked before the payment was made. He did not, however, communicate to the plaintiff that he had no authority; on the contrary, he professed to act for the defendant, and the plaintiff believed him to be so acting, and received the sum paid in full satisfaction of his debt. But when the plaintiff found that the money had been paid without the defendant's authority, he returned the money to Southall. And now the question is, whether the defendant can by his plea of payment adopt and ratify the act of Southall, although before action that act had, by arrangement between the plaintiff and Southall, been undone.

Now, the law is clear, that where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to ratify the payment; and there seems to be no doubt on the authorities that he can ratify after action by placing the plea of payment on the record. Primâ facie, therefore, we have here a ratification of the payment by the defendant's plea; but whether the payment was then capable of ratification depends on whether previously it was competent to the plaintiff and Southall, apart from the defendant, to cancel what had taken place between them. I am of opinion that it was competent to them to undo what they had done. The evidence shews that the plaintiff received the money in satisfaction under the mistaken idea that Southall had authority from the defendant to pay him. This was a mistake in fact, on discovering which he was, I think, entitled to return the money, and apply to his debtor for payment. If he had insisted on keeping it, the defendant might at any moment have repudiated the act of Southall, and Southall would then have been able to recover it from the plaintiff as money received for Southall's use. I am, therefore, of opinion that the plaintiff, who originally accepted this money under an entire misapprehension, was justified in returning it, the position of the parties not having been in the meantime in any way altered, and that the defendant's plea of payment fails. The rule must accordingly be made absolute.

MARTIN, B. I am of the same opinion. The rule which I conceive to be the correct one may be stated as follows. When a payment is not made by way of gift for the benefit of the debtor, but by an agent who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the payment is at an end, and the debtor again responsible. This being, in my judgment, the true rule, the plaintiff in this case was entitled to recover.

KELLY, C.B. My Brother Cleasby concurs in the judgment of the Court.

Rule absolute.

Attorney for plaintiff: *Southall.*

Attorneys for defendant: *W. Rogers, for Wright & Marshall, Birmingham.*

Feb. 10.

BORROWS AND WIFE *v.* ELLISON.

Prescription Act (3 & 4 *Wm.* 4, *c.* 27), *s.* 16—*Disability—Successive Disabilities without Break—Infancy—Coverture.*

When the person to whom the right to bring an action for the recovery of land accrues is under a disability, and before the removal of that disability the same person falls under another disability, s. 16 of 3 & 4 Wm. 4, c. 27, preserves his right to bring an action until ten years after the removal of the latter disability.

In 1833, the plaintiff became entitled to land, which the defendant then entered into possession of, and continued to occupy until action brought. At the time when the plaintiff's title accrued she was an infant; she married under age, and continued under coverture until the time of bringing this action in 1870. In an action by herself and her husband in her right to recover the land:—

Held, that the action was maintainable, notwithstanding that more than twenty years had elapsed since the title accrued, and more than ten years since the removal of the disability of infancy.

EJECTMENT tried before Cleasby, B., at the Liverpool Summer Assizes, 1870.

The plaintiff, Ann Borrows, claimed, as one of the testator's children, under the will of Joshua Ellison, who died on the 30th of June, 1828. By his will the testator devised his freehold estate, on his wife's death or marriage, equally between and amongst all his children, share and share alike.

The defendant, the testator's eldest son, claimed under a codicil, by which, as he contended, the testator had devised the whole freehold estate to him.

He also contended that the plaintiffs were barred by 3 & 4 Wm. 4, c. 27, s. 2, as to which the following facts were admitted:—

The widow of the testator married again on the 14th of February, 1831, and thereupon the defendant entered on the property, of which he had ever since kept possession.

The plaintiff Ann married the co-plaintiff Thomas Borrows on the 14th of October, 1833, she being then under age.

Upon these facts, it was contended for the plaintiffs, that as the disability of coverture had commenced before the disability of infancy terminated, the disability was continuous, and the right of Ann Borrows was saved by s. 16. (1)

A verdict was entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them. A rule having been obtained accordingly,

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(1) 3 & 4 Wm. 4, c. 27, s. 16, provides that, "if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, &c., then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under *any such disability*, or shall have died, which shall have first happened."

S. 17 provides that "no entry, distress, or action shall be made or brought by any person who at the time at which his right to make any entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability or have died, shall not have expired."

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Holker, Q.C., and *Wheeler*, shewed cause. (1) The words of the 16th section do not admit of the plaintiffs' construction. The section says, that the action may be brought "within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability," that is, such disability as is mentioned in the previous part of the section, namely, a disability existing "at the time at which the right of any person to make an entry or distress or bring an action" first accrued. No disabilities, therefore, are protected except such as existed at the time when the title first accrued.

It agrees with this that the word is in the singular; and although s. 1 gives to words in the singular the force of the plural, that cannot apply when, as here, the context shews that the singular was meant. But if it could, the plaintiffs would not be assisted, for still the disability must be "such" a disability, namely, a disability existing when the title accrued.

[THE COURT referred to s. 17.]

The words of the 17th section limiting the time to forty years, "although the person under disability at such time may have remained under one *or more* of such disabilities during the whole of such forty years," are not inconsistent with the defendant's argument; the section does not say that one disability may supervene upon another so as to continue the protection; rather the contrary may be inferred. The words "under disability," in the first part of the section, are general, and if the meaning had been as suggested, the same general words would have been used in the latter part of the section; but, on the contrary, the words used are, "may have remained under one or more of such disabilities;" these words signify that the person entitled must remain under the specific disability or disabilities under which he was when his title accrued; the words "one or more" are probably inserted to meet the case of more than one disability existing at the time when the title accrued, and one of those disabilities afterwards ceasing.

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(1) The questions arising on the construction of the will and codicil, as to which the Court decided against the defendant's construction, are of no interest; the case is therefore not reported upon this point.

[*Baylis* referred to *Lessee of Supple* v. *Raymond.* (1)]

The section of the statute under which that case was decided differs from 3 & 4 Wm. 4, c. 27, s. 16; it has no words referring the disability whose termination is spoken of to the disability existing at the time of the title accruing.

Baylis (*Milward, Q.C.*, with him), in support of the rule, was not called on.

MARTIN, B. The Irish case is directly in point, and I should have come to the same conclusion without that authority. We cannot read the saving clause in so confined a way as was contended for by Mr. Holker. The party never at any time being free from disability, the disability, though due to different causes, must be looked upon as one continued thing.

PIGOTT, B. I am of the same opinion. The words at the end of s. 16 must be construed reasonably. The intention was to give an extended time to the person entitled, so long as he remained under disability. If no break occurs, but the causes of disability overlap, he does so continuously remain under disability, notwithstanding there may be more causes than one.

CLEASBY, B. I am of the same opinion. The words of the 16th section are "any such disability;" that is, any of the disabilities previously mentioned.

Rule absolute.

Attorneys for plaintiffs: *Gregory & Co.*
Attorney for defendant: *S. Marsh.*

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(1) Hayes, 6, decided under 10 Car. 1, Sess. 2, c. 6, s. 13 (Irish), which enacts that "if any person or persons that hath or shall have such right or title of entry [as mentioned in s. 12] be or shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, femme covert, non compos mentis, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years [limited by s. 12] be expired, make his entry as he might have done before this Act; so as such person and persons, or his or their heir or heirs, shall within ten years next after his or their full age, discoverture, coming of sound mind, inlargement out of prison, or coming into this realm, or death take benefit of the same, and at no time after the said ten years."

[IN THE EXCHEQUER CHAMBER.]

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MAXTED *v.* PAINE.

[SECOND ACTION.]

Stock Exchange—Sale of Shares—Usage of Stock Exchange—Ultimate Buyers—Ticket—Principal and Agent.

6 Ex 258, 261
263-4,
13 Eq 205
906
7 Ch 734, 746
750, -2,
757, -8
7 CP 634, -7
7 HL 534
543,

The plaintiff having through his brokers on the Stock Exchange sold to the defendant, a jobber, ten shares in Overend, Gurney, & Co., Limited, the defendant on the "name day" passed a ticket to the plaintiff's brokers containing the name of G. as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to G. of the ten shares. It was afterwards discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., and had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, and according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers, as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares which the plaintiff was compelled to pay, and which he was unable to recover from G., he brought this action to recover them from the defendant:—

Held, affirming the judgment of the Court below (Lush, J., dissenting), that the action was not maintainable.

By Keating, Mellor, Montague Smith, and Brett, JJ., that the defendant had fulfilled his obligation by passing a name to which no objection was taken within the time limited by the usage, and that in the absence of any fraud on his part, he could not be treated as ultimate buyer himself, or be made liable for the calls.

By Blackburn, J.:—

1. That under a contract for the sale of shares, apart from Stock Exchange usages, the seller cannot require the buyer to take a transfer into his own name; but that he has a right to be indemnified by the buyer against future calls, which is not affected by his transfer of the shares to the buyer's nominee.

2. That in a contract for the sale of shares made on the Stock Exchange "for the account," all the parties to it who are members of the Stock Exchange contract amongst themselves as principals, and there is no difference between a member who is a jobber and one who is not.

3. That according to the usage of the Stock Exchange, as proved in this case, upon a sale on the Stock Exchange "for the account," fifteen days is the extreme time within which the member holding or issuing the name-ticket, as the case may be, is to declare any failure on the part of the issuer of the ticket to accept and pay for the shares, or on the part of the holder of the ticket to deliver them; and the omission to do so has the effect of preventing him from coming on the intermediate parties who have passed the ticket for such default.

When the transfers have been delivered to the issuing member, and the price is fully paid to the holder, there is a novation, which frees the member who merely passed the ticket from further liability.

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If either, or both, of those members were agents for others, the principals, though undisclosed, may sue and are liable to be sued to the same extent as their agents, and no more.

The novation is between the holder of the ticket or his principal and the issuer of the ticket or his principal.

4. That, in the present case, the defendant completely fulfilled his contract by delivering on the name day a ticket really issued by a member of the Stock Exchange, and was not responsible for any mistake or misconduct on the part of the issuers of the ticket, not having been applied to within the time limited for that purpose by the rules of the Stock Exchange.

By Cockburn, C.J., that G. was the ultimate purchaser of the shares within the meaning of that term as applied in the usage of the Stock Exchange, and was so treated by the plaintiff, and that the defendant was therefore free from liability according to the decision in *Grissell* v. *Bristowe* (Law Rep. 4 C. P. 36).

By Lush, J., that G. not being the real buyer of the shares, the defendant, by passing G.'s name as ultimate purchaser, had not fulfilled his contract with the plaintiff, whom he was therefore liable to indemnify against calls.

ERROR from the decision of the Court of Exchequer in favour of the defendant on a special case. (1)

May 18, 19, 1870. The case was argued for the plaintiff by *Manisty, Q.C.* (*Herschell* with him), and for the defendant by *Macnamara* (*Mellish, Q.C.*, and *Beresford* with him).

The following authorities, in addition to those referred to in the Court below, were cited during the argument: *Payne's Case* (2); *Bank of Hindustan* v. *Kintrea* (3); *Castellan* v. *Hobson* (4); *Whitehead* v. *Izod* (5); *Shaw* v. *Fisher*. (6)

Cur. adv. vult.

Feb. 11, 1871. The following judgments were delivered:—

MONTAGUE SMITH, J. My Brothers Keating, Mellor, and Brett, agree with me in the following judgment:—In this case the plaintiff claims to be indemnified by the defendant in respect of two calls which he was compelled to pay on ten shares in Overend, Gurney, & Co. The shares were sold on the Stock Exchange by the plaintiff's brokers to the defendant, a jobber, and afterwards transferred by the plaintiff under the circumstances hereinafter mentioned to a person called Goss. The transfer was not registered, and the plaintiff remaining on the register was compelled to pay two calls made after the transfer to Goss. He now claims to be indemnified by the defendant on an implied obligation which he alleges to exist under the original contract of sale. The principal questions for consideration are, what are the usages of the Stock Exchange with reference to the circumstances of this case, and to what extent those usages are applicable to, and form part of this contract, and govern the performance of it? The sale was made on the Stock Exchange on the 24th of May, 1866, after the stoppage of the company, by Messrs. Sandeman, Dobree, & Co., the brokers of the plaintiff, to the defendant, a jobber. It is found in the case that the plaintiff instructed Messrs. Sandeman & Co., whom he knew to be brokers on the Stock Exchange, to sell the shares for him on the Stock Exchange, and that they were sold there by such brokers in pursuance of those instructions in the usual manner "for the account day." Certain rules and usages of the Stock Exchange exist relating to sales made for the account day, and to the manner in which such sales are to be carried out.

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(1) Reported Law Rep. 4 Ex. 203, where the facts are fully stated.

(2) Law Rep. 9 Eq. 223.

(3) Law Rep. 5 Ch. 95.

(4) Law Rep. 10 Eq. 47.

(5) Law Rep. 2 C. P. 228.

(6) 5 De G. M. & G. 596.

9QB243.

It appears that the shares were 50*l.* shares, and that 15*l.* only had been paid up. The sale was at 17 discount, which means that, contrary to the ordinary course of things between seller and buyer, the seller was to give 2*l.* to the buyer to take the shares from him. It must be evident that in a sale of shares under these conditions the vendor is selling in order to relieve himself from future liability to calls upon the shares, and consequently it is implied in such a contract that a new taker of the shares shall be substituted for him, who will agree to take the liability on himself. In furtherance of this implied understanding it has been held that the person who assents to be the transferee, and has a transfer executed to him, although he is not the original buyer, becomes in privity with the transferor, and is bound to indemnify the transferor from liability to future calls: see *Walker* v. *Bartlett* (1), *Hawkins* v. *Maltby*. (2)

The usages and practice of the Stock Exchange are stated in the case. It appears from them that, in bargains for the account, the jobber, on the day previous to "the account day," is bound to

(1) 18 C. B. 845; 25 L. J. (C.P.) 263.

2 Jur. N.S. 643.

(2) Law Rep. 3 Ch. 188.

pass to the selling broker the name of a person willing to take the shares as "the ultimate purchaser" of them. This day is called "the name day," and, of course, is as familiar as "the account day." If there have been no sub-sales, or if he chooses to do so, the jobber may pass his own name as the ultimate purchaser. The name of the ultimate purchaser is given by passing a document called "the name ticket," made out by the broker of the ultimate purchaser, and which ticket may, and most frequently does, pass through the hands of many intermediate dealers on the Stock Exchange. It is a consequence of these usages that the jobber is not bound to take a transfer of the shares to himself, but may, in the above way, pass the name of another person as a purchaser; and when this is done the transfer is made to such purchaser.

It is found to be a part of the custom, and it is a part which has a very material bearing on the questions arising in this case, that the selling broker, at any time before the transfer of the shares is executed, may object to the name given by the jobber; and in the event of the jobber and broker failing to agree, the broker may appeal to the committee of the Stock Exchange, who, on such appeal, "have the power to require the jobber to give a better name." It appears to us that this custom is distinctly and positively found; all which is left at all uncertain in the finding, relates only to the mode in which the committee would act in the exercise of their power. The jobber, by the rules, pays to the selling broker the price at which he agreed to buy the shares. It is found in the case that when the price has been paid, and the jobber has given a name pursuant to the rules, which is, of course, subject to the usage giving the right to object, he has fulfilled all the obligations required of him by the usages of the Stock Exchange. It may be that the rules of the Stock Exchange for the completion of bargains were mainly framed with reference to the dealings in shares where the liability to future calls is not in contemplation; but the usage giving the right to object to a name, above referred to, seems to be precisely adapted to the cases of transactions in shares where such future liability exists. It must be notorious, as matter of fact, that for many years there have been dealings to an immense extent in shares in public companies, which have not been fully paid up, and as to which, therefore, a liability to future calls would rest upon the seller until the transfer was registered. The fact that the seller, as in this case, sells his shares at a discount larger than the sum paid on them, whilst it shews that the liability to future calls is thought to be imminent, does not alter the character of the transaction.

There would, therefore, appear to be no sufficient reason for coming to the conclusion that the rules of the Stock Exchange, qualified, as above, by the power to object to the name given as the ultimate purchaser, should not be applicable to sales of shares such as that made between the plaintiff's brokers and the defendant in this case, although the effect of the contract, no doubt, is rather to transfer a liability than a benefit. We have referred to the usages of the Stock Exchange for the purpose of directing attention to such parts of them as bear most directly upon the special circumstances in which this case differs from those already decided; but it is unnecessary further to discuss the general question, because it has been decided by courts of appeal of co-ordinate jurisdiction that contracts of the character above referred to are to be interpreted and governed by the usages of the Stock Exchange: *Coles* v. *Bristowe* (1); *Grissell* v. *Bristowe*. (2)

The main contention on the part of the plaintiff was this: Assuming that the rules of the Stock Exchange do apply to sales of the above description, and that where the name of a bonâ fide purchaser is given and accepted and the transfer made to him, the jobber is no longer liable; yet that, under the circumstances of this case, where it is contended that the name given was not that of a real ultimate purchaser, the responsibility of the jobber is not terminated. The short facts on this point are as follows: Messrs. Foster and Brathwaite, the brokers issuing the name ticket, which ultimately was passed to the defendant and by him to the plaintiff's brokers, had bought ten shares for Sir Samuel Spry. This purchase was made before the stoppage of Overend, Gurney, & Co.; and after that stoppage Sir Samuel Spry, not desiring to take the shares, procured, through his solicitors, a person of the name of Goss to take a transfer of the shares into his name, and paid him 4*l.* 10*s.* for his assent to do so. Goss was a person without means.

(1) Law Rep. 4 Ch. 3.

(2) Law Rep. 4 C. P. 36.

Sir Samuel Spry's solicitors then instructed Messrs. Foster and Brathwaite not to pass his name, and gave them the name of Goss to be passed in the name ticket. Messrs. Foster and Brathwaite accordingly put Goss's name in the ticket, which, after passing through several brokers' hands on the Stock Exchange in the usual way, ultimately came to the defendant, who passed it on to Messrs. Sandeman & Co. The plaintiff's brokers, Messrs. Sandeman & Co., without making any inquiry about Goss or raising any objection to him, prepared the transfer of the shares to Goss, and it was executed by the plaintiff, and then delivered by Sandeman & Co. to Foster and Brathwaite, who handed it to the solicitors who acted for Sir Samuel Spry, and apparently for Goss, in the transaction. The price was duly settled by the defendant with the plaintiff's brokers. The name and address of Goss, who lived in London, were truly given to Foster and Brathwaite, and stated in the name ticket; but neither they nor the defendant knew the circumstances under which his name was given, except that Foster and Brathwaite, of course, knew that Sir Samuel Spry had instructed them to purchase, and had then, through his solicitors, instructed them not to give his name, but to give the name of Goss.

Goss, although he did not execute the transfer, clearly assented to have the transfer made to him. The transfer is dated on the 31st of May, 1866, and was handed over by Sandeman & Co., the plaintiff's brokers, to Foster & Brathwaite on the following 7th of June. Two calls were subsequently made, viz., on the 20th of August, 1866, and the 10th of June, 1867, which the plaintiff was obliged to pay. No notice of this was given to the defendant, and no claim was made by the plaintiff until the 13th of April, 1867, when he made an application to the committee of the Stock Exchange. It is obvious upon this statement that everything had been done for completing the contract by transfer, so far as the defendant is concerned, in conformity with the usages of the Stock Exchange. And supposing the name of Sir Samuel Spry had been passed on the ticket, it could not have been contended, consistently with the decisions already referred to, that after the plaintiff had accepted his name and had executed the assignment of the shares, the defendant would still have remained liable to indemnify the plaintiff against future calls. But it is said that the substitution of the name of Goss for Sir Samuel Spry was an irregularity, or a fraud, preventing the operation of the rules of the Stock Exchange, which would put an end to the liability of the defendant. There was clearly no irregularity or fraud so far as the defendant was concerned. It is not necessary to determine whether the circumstances under which Goss became the substitute for Sir Samuel Spry gave to the plaintiff the right to resort to him or to his brokers for indemnity. But they do not seem to us to constitute a fraud which prevents the defendant from asserting that he has performed all the obligations of his contract. It must, in the usual order of business, be a common and well known practice for persons to give orders to brokers to purchase shares which they do not intend to have transferred into their own names, as in the cases where shares are bought as a gift to relatives, and other like cases. The mere fact, therefore, that the buying broker does not insert the name of the person by whom he is instructed in the ticket is, probably, no irregularity at all. It is not found as a fact that it is an irregular proceeding, and it certainly would not by itself be evidence of fraud. In many cases it may obviously be of little practical consequence to the seller, so long as he retains the right to object, whether the name be that of an original buyer or not, for it must very frequently happen, as a matter of fact, that the original buyers of worthless or doubtful shares are speculative persons without means. The protection of the seller is found in the usage of the Stock Exchange, which gives him the right to object to the proposed transferee, and to require a better name. In this case, Messrs. Foster & Brathwaite of course knew when they passed Goss's name that he was not their principal, but the defendant certainly could not know whether Goss was the original buyer from them or not. In fact, in cases of this kind, none but the brokers issuing the name ticket can know whether the name in the ticket is that of the person originally giving authority to buy, or a nominee of his. The circumstances under which Goss, a man without means, was induced by the solicitors of Sir Samuel Spry to consent to take the transfer may, or may not, amount to a fraud, which, as between the plaintiff and Sir Samuel Spry, would entitle the plaintiff to relief: see on this point the judgment of James, V.C., in *Castellan* v. *Hobson* (1); but we fail to see how those circumstances shew that the defendant has not fulfilled his obligation under the contract according to the rules of the Stock Exchange. The effect of the passing of the name of the nominee of the person who originally authorized the buying broker to purchase the shares, instead of the name of such person, cannot, we think, be to abstract from the contract between the plaintiff and the defendant the usages of the Stock Exchange. Those usages must still form a part of the contract, and the question whether the defendant has fulfilled the obligations of his contract must be solved with reference to them; and, supposing this to be so, it appears to us that the defendant has done all he was bound to do, and all he could do, in accordance with the usages. Moreover, he has confessedly acted in a perfectly bonâ fide manner throughout the transaction. On the other hand, the plaintiff's brokers have not done all they might have done in accordance with the usages of the Stock Exchange. They, as well or better than the defendant, must have known the object the plaintiff had in selling his shares, and however unusual it may be to do so, they might have made inquiry about Goss, and, if dissatisfied, might within the proper time, viz., ten days, have objected to accept him as the transferee, and required the defendant to give a better name. If the plaintiff's brokers and the defendant had not agreed on the matter, then, according to the usages, the committee of the Stock Exchange might have been referred to, and might have ordered a better name to be given.

We cannot doubt upon the evidence that if an objection had been made by the plaintiff's brokers, a better name than Goss's would have been obtained either by agreement or under compulsion. It results from what has been already said, that the loss of the plaintiff might have been prevented if his brokers had done what, by the usages of the Stock Exchange, they were empowered to do; but they made no inquiry or objection, and adopted Goss as a transferee. The plaintiff transferred the shares to him, and the deed of transfer was handed over, without any intervention of the defendant, directly by the plaintiff's brokers to Messrs. Foster

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(1) Law Rep. 10 Eq. 47.

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& Brathwaite. The plaintiff, therefore, not only assented to treat Goss as assignee, but executed the contract by transferring the shares to him, and the plaintiff and Goss were thus brought together as contracting parties: *Hawkins* v. *Maltby.* (1) It is true that when this was done, the plaintiff was ignorant of the circumstances under which Sir Samuel Spry had obtained the assent of Goss to be transferee, and these acts may not interfere with his remedy, if any, against Sir Samuel Spry. It may be—but on this question we give no opinion—that sufficient evidence exists to shew that Sir Samuel Spry was the real purchaser as between himself and the plaintiff: see *Castellan* v. *Hobson* (2); but the acts done by the plaintiff, when considered as between the plaintiff and the jobber, are in strong contradiction to the supposed right of the plaintiff to treat the defendant as the purchaser of the shares, and to found on that relation the implied liability to indemnify him from the calls. This implied liability was undoubtedly imposed upon Goss by his acceptance of the transfer, and the plaintiff having actually transferred the shares to him as the purchaser, cannot, we think, now alter the position of the defendant, and throw upon him the liabilities, when he cannot give him the rights, of a purchaser. The attempt to do so was not made until nearly a year after the completion of the transaction, and after the plaintiff had long known the actual state of the case. If the jobber's liability were not at an end when he has passed the name of a purchaser to whom no reasonable objection can be made, or of one to whom no objection is made when it might have been, and who is adopted by the seller as the transferee, it would be difficult to say when and under what conditions it would cease. The usages of the Stock Exchange provide at once for the security of the seller and of the jobber; they give the right to the seller to object to the nominee, and make the jobber liable as purchaser until a nominee is tendered to whom no objection can reasonably be made, or one to whom no objection is made when it might have been. Suppose the plaintiffs had made inquiry about Goss, and had then elected to accept him; or suppose Goss had been solvent when the ticket was first passed, but became insolvent after the transfer; or suppose a man of apparent solvency was named in

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(1) Law Rep. 3 Ch. 188.

(2) Law Rep. 10 Eq. 47.

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the ticket, who, being really insolvent, was accepted; how uncertain under these and many other conditions which might be suggested would the liabilities of the jobber be if the usages did not determine them. It is not likely that any rules will satisfactorily meet all the questions which may arise in cases of this kind, where the real nature of the transaction is that the holders of shares with large prospective liabilities are trying to dispose of them to unknown substitutes, but we confess that it seems to us the usages of the Stock Exchange in this respect, if acted on, would reasonably provide for the security both of the seller and the jobber, and if the brokers for the sellers will take care to exercise the power of objection in cases requiring it, their employers may in future be protected from the danger of transferring their shares to persons unable to fulfil the obligations they undertake. It appears to us that our present judgment is consistent with and supported by the recent decisions in the courts of appeal both of law and equity. The present case is clearly distinguishable from *Cruse* v. *Paine* (1), where the jobber was held liable. In that case the contract was made "with registration guaranteed," and Lord Hatherley, L.C., determined the case with reference to this express guarantee which had not been fulfilled. The case of *Maxted* v. *Paine* (1st action) (2) is also distinguishable, for in that case the person whose name was passed as the buyer had not agreed, when his name was so passed, to purchase or take the shares, and the Court of Exchequer in giving judgment in the case now before us, which was subsequently determined, did not apparently consider their decision in the former case to affect or govern the present.

In the result we think the judgment of the Court of Exchequer ought to be affirmed.

LUSH, J. I regret that I am unable to concur with my learned Brethren in thinking that the judgment of the Court below ought to be affirmed. As the facts have been fully stated in the judgment already delivered, I do not repeat them. 6 QB 213.

The question is, what was the contract of the defendant as interpreted by the usage of the Stock Exchange set out in the case, that usage being supplemented by the printed rules; there being no doubt that the usage was incorporated into and formed part of the contract. If the contract was, that he would, if he did not take the shares himself, give as his substitute the name of his sub-vendee, he has broken his contract. If, on the other hand, the alternative was that he would give the name of some person willing to take them without regard to whether that person should be the buyer or not, he has fulfilled his contract, and the plaintiff must fail.

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(1) Law Rep. 4 Ch. 441.

(2) Law Rep. 4 Ex. 81.

The question, as observed by Bramwell, B., in the Court below, is entirely a question of fact; one which if the cause had been tried must have been left to the jury. We are, however, by the case put in the place of the jury, and must take upon ourselves the functions which properly belong to, and which I cannot help thinking would in this case have been much more satisfactorily performed by them. Whether, if the shares were to turn out profitable, Sir Samuel Spry would be able to invite the aid of the courts to get them back from Goss seems to me irrelevant to the inquiry. The question is not, what are the rights of Sir Samuel Spry as against Goss, but what are the rights of the plaintiff as against his vendee; whether the defendant had a right to put forward Goss as the transferee instead of Sir Samuel Spry.

In the cases of *Coles* v. *Bristowe* (1), and *Grissell* v. *Bristowe* (2), the jobber had done what, it is contended by the present plaintiff, he ought to have done here, namely, he had given, as the transferee, the name of the real purchaser, and the decision was that he had by so doing performed his contract, and was therefore not answerable for any subsequent default of the transferee. In this case the name he has given is not that of the purchaser. Is the distinction material? I cannot help thinking that it is. Now, I cannot suppose that the rules of the Stock Exchange were devised with any view to their sanctioning or allowing of any such trickery as was perpetrated in this case. It is as much the interest of that body as it is the interest of the public who buy and sell through their agency, to promote fair dealing. The rules appear to have been framed for the twofold purpose of giving all possible facility for the transmission of shares from hand to hand in the interval between the purchase and the settling day, and also of securing and enforcing by the agency of a domestic tribunal the bonâ fide performance of contracts. I cannot, therefore, give to the usage such a construction as would enable the buyer to evade the liability which the contract of purchase involves, except so far as I can see, from the plain terms of the usage, that it was intended he should be relieved from that liability. Looking at the evidence as to what the usage is and to the printed rules of the Stock Exchange, I think the object clearly is to bring together on the account day the original seller and the ultimate buyer. There is nothing in the evidence or the rules which would suggest to my mind the notion that the substitution of any one but his sub-vendee would satisfy the contract of the jobber, but the contrary. It is plain that if on the settling day the jobber remains the holder of the shares he has no option. The statement is explicit that in such case he must "take to the shares himself," an expression which I can only interpret as meaning that he must take a transfer of them to himself. If he sells them he sells to a broker who is by the terms of the 87th rule (1) bound to pass to him in the same way a ticket containing the "name and address of the buyer," and this ticket the jobber is, by his contract, at liberty to pass on to his vendor. Every broker who subsequently buys the shares buys upon the same terms. So that what the rules contemplate is the transfer to the jobber himself if he has not sold the shares, and the transfer to his vendee if he has.

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(1) Law Rep. 4 Ch. 3.

(2) Law Rep. 4 C. P. 36.

If, when he has sold the shares, he is at liberty to give to his vendor the name of a person who is not the buyer, I cannot conceive why he should be prohibited from giving the same name when he has not sold. For it is no concern of the seller what the jobber does with the shares. All that he wants is a transferee who is able and willing to answer for any calls which may thereafter be made, and such person, it is presumed, he will find in the person who buys them. The inference, to my mind, from this prohibition is irresistible that the intention was to prevent the substitution of a sham purchaser for the real one.

Great stress was laid upon the fact, which is stated in the case, that both the defendant and the brokers who first handed in the ticket with Goss's name, were ignorant of the circumstances of

(1) Set out Law Rep. 4 C. P. at p. 54.

Goss, and of the arrangement by which he was induced to allow the use of his name, and counsel shrank from contending that either of these parties would have been justified in giving Goss's name if they had known who and what he was. But I am unable to see, upon the grounds taken by the defendant, what difference this would have made. If it is within the contract to give in the name of any person willing to take the shares, whether he be the buyer or not, subject to the contingency of the seller objecting to him, the defendant would have been equally justified in what he did if he had done it with full knowledge of the facts. If it is not within the contract, but a breach of it, his ignorance that it is a breach does not exonerate him.

It was contended, that this construction of the usage is unreasonable and must be rejected, inasmuch as the defendant did not, and jobbers and brokers of intermediate buyers, cannot, in general, know whether the name handed to them is that of the real purchaser or not.

If the incurring of liability for the acts and defaults of others were uncommon in matters of business, there would be force in the objection. But responsibilities of this kind are constantly undertaken in commercial transactions. A merchant sells a cargo, which he warrants to be of a given quality, not because he has seen or knows anything about it, but merely because he bought it with a warranty. Another contracts to deliver goods on a given day, trusting to the engagement of the person of whom he bought, that he will deliver on that day. It is one of the necessities of commerce that men should act upon the faith of each other's engagements.

What is there unreasonable in supposing that the jobber who sells trusts to the good faith of the broker that the latter will perform his contract? The merchant who warrants the quality of his goods knows that if the warranty is broken it will be no excuse that it was broken by the merchant who sold to him, but that he must answer to his vendee for the loss his breach of contract has occasioned, and look to his vendor for reimbursement. So, in this case, the jobber must answer for his breach of contract to the seller, and must look to the broker who bought of him for reimbursement, and he, in his turn, to his vendee, and so on till the delinquent is reached. In no other way can justice be done, at least in a court of law, whatever remedy there may be in equity, inasmuch as there is no privity, and, therefore, no right of action between the original seller and the ultimate purchaser who does not take a transfer?

Another point relied on is, that time is given by the usage for inquiring into the sufficiency of the nominee, and this, it is alleged, implies that the jobber is at liberty to name whom he will, seeing that the vendor is at liberty to reject him if he can shew that the nominee is not a responsible person. I cannot see that any such implication arises from this provision. The real purchaser may be a person whom the vendor may not choose to trust, one whom he may not unreasonably decline to take in substitution for the jobber to whom he sold, and it is a reasonable qualification of the option to put another in his place, that the other shall be a responsible person.

I agree that if Goss had been the real buyer, the not objecting to his sufficiency within the stipulated time would have precluded the plaintiff from taking objection to his sufficiency afterwards. But if the contract was, as I take it to have been, that the real purchaser should be named, the fact that Goss was accepted as such in ignorance of his real character, cannot be a defence to the breach of contract.

A further ground of objection was, that the transfer of the shares to Goss concludes the plaintiff, as he has thereby disabled himself from completing his contract with the defendant, and has acquired a new cause of action against Goss. I agree that by the transfer of the shares to, and their acceptance by Goss, the latter became liable to an action for not indemnifying the plaintiff against further calls. This is a liability arising out of the relation of transferor and transferee, and is contemplated by the contract. It is, in fact, the condition upon which the jobber is relieved from personal performance. The very ground of complaint is, that this liability ought to have been undertaken by Sir Samuel Spry. The defendant, in effect, said by his contract (assuming I am right in my construction of it), "I will either take the shares myself, or give you the name of my sub-vendee, who will take them, and therefore become liable to indemnify you against future calls." But he did not give the name of his sub-vendee, and the consequence is, that the plaintiff has in ignorance of that fact transferred to Goss, and, by so doing, has lost the remedy which he would have had against Sir Samuel Spry. By the act of the defendant, or those for whom I think he became responsible, the plaintiff has been induced to transfer to a sham buyer, who is insolvent, instead of to the real buyer who is solvent.

The other branch of this objection, namely, that the plaintiff has put it out of his power to deliver the shares to the defendant, is based upon a misconception of the nature of the action. If the complaint were that the defendant refused to accept and pay for the shares an averment of readiness and willingness to deliver them would be essential, but this is like the case where the buyer of goods has induced the seller to deliver them to a third person upon his guarantee that that person is solvent. In such case the action is not for the price but for such damage as the seller has sustained by reason of the insolvency of the third person. Another argument urged upon us, and one which appears to have weighed with the Court below, was, that to hold the jobber bound to give the name of the real buyer would operate as an inconvenient restriction, inasmuch as it would prevent purchasers from vesting shares in trustees of settlements or making gifts of them by way of advancement or otherwise. If such should be the consequence, the inconvenience would be as nothing compared with the mischief which, in my opinion, would result from the opposite decision. It matters little that the buyer in the cases supposed should be obliged to take the transfer to himself in the first instance and then pass them over to his trustee or donee; but it is of great moment that no encouragement should be given to evasion or trickery. I am, however, far from being convinced that such consequence would follow. There is a substantial distinction between a person who takes with the intention of holding as owner and bearing the burden of ownership and one selected for the mere purpose of enabling the owner to take the chance of profit and avoid the risk of loss; one who cannot bear the burdens of ownership, and who, for that very reason, is chosen, and consents to take the shares in his name. It does not follow because the latter is not deemed to be the "buyer" that the former may not well be regarded as such within the contemplation of the parties and the reasonable scope of the usage.

For these reasons I am of opinion that the judgment of the Court below is erroneous.

BLACKBURN, J. In this case the plaintiff, through his brokers, Sandeman, Dobree & Co. (who were members of the Stock Exchange), on the 24th of May, 1866, made a contract on the Stock Exchange for the sale to the defendant, a jobber (also a member of the Stock Exchange) of 100 shares in a joint stock company, Overend, Gurney and Co., Limited, at 17 discount for the next account day, viz., the 30th of May, 1866. As far as regards thirty of those shares no question was ever raised, and as regards sixty of them it was admitted, in the court below, that the defendant had fulfilled his contract, and no attempt has been made in the Court of Error to question the judgment given for the defendant in respect of so much. The facts as relates to the remaining ten shares are as follows:—

The defendant Paine, in the course of his business as a jobber had, besides contracting with Sandeman & Co. for the purchase from them of 100 Overends on the terms of being paid by them 2*l.* a share for relieving them of what was, at the time, considered by the parties a burthensome possession, contracted with Messrs. Barry & Co. (also members of the Stock Exchange) for the sale to them for the same account of Overends, on what terms as to payment is not stated in the case. Foster and Brathwaite (also members of the Stock Exchange) had, it appears from the twenty-fifth paragraph, purchased from some member of the Stock Exchange, whose name is not given, 140 Overends for the same account, as I collect though it is not expressly stated, at a discount of something not far from half, but at all events so that Foster & Co. had to pay for the shares, which, at the time when this contract was made were considered, by the parties to it, a valuable possession. In making this last contract Foster and Brathwaite, who were brokers, were in fact acting for Sir Samuel Spry, who is not a member of the Stock Exchange.

All contracts on the Stock Exchange are made by the members among themselves as principals, and though from the fact that one

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of the parties is a broker the other would have good reason to believe that there was an undisclosed principal behind, he would not know that for certain, and the contract would have the effect of making the two members liable to each other as principals. The undisclosed principals of those two members can at law enforce, and are at law liable for the contracts made by their agents; and the rules 49, 61, and 62 of the Stock Exchange (1), though they indicate clearly a wish to exclude all non-members from any right to enforce a contract made on the Stock Exchange, are ineffectual for that purpose; but though not effectual for this object, they have, in my mind, great importance when we come to construe the rules of the Stock Exchange and their usages, as those rules shew a clear intention as much as possible to confine the power to enforce, and the liability on, contracts to members only.

Foster & Co., as such members, in due course issued a ticket. Whether this ticket was originally issued for the 140 Overends and afterwards split, or whether they originally for some reason issued a ticket for ten shares only, is not stated, and is probably not material; but Messrs. Barry & Co. became holders of a ticket on which appeared the names of Foster and Co. as issuers of the ticket for ten Overends, and as the members of the Stock Exchange who were to pay 144*l.* 7*s.* 6*d.*; and Francis Robert Goss, of 17 William Street, Camden Town, Holloway, as the name supplied by Foster & Co. as that into which the shares were to be transferred. This ticket would bear upon it the names of each member of the Stock Exchange through whose hands it passed. Messrs. Barry passed this ticket to the defendant Paine, who then passed it on to Sandeman and Co. It would, when it came into the hands of Sandeman & Co., have the names of Barry & Co. and of Paine on it as two of the members of the Stock Exchange through whose hands it passed. It is obvious that at the time when this ticket was received and handed on in the Stock Exchange, no one of the different members, subsequent to Foster & Co., who received and handed it on, could in the ordinary course of things know more

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(1) See rules 49 and 61, set out Law Rep. 4 C. P. at p. 53, and Law Rep. 4 Ex. at p. 214. Rule 62 is as follows:—"No member shall be obliged to take a reference for payment to a non-member; nor shall he be obliged to pay a non-member for any securities bought in the Stock Exchange."

about Goss than that his was a name given in by Foster & Co., members of the Stock Exchange; and it is expressly found that the defendant Paine was entirely ignorant of the manner in which the name of Goss was obtained, which I will notice presently. Sandeman & Co., having received this ticket, were brought in contact with Foster & Co. They had, by their contract with Paine, to pay 20*l.* as a consideration for getting rid of ten shares considered by them a burthen, as in fact they turned out to be, and they were made aware by the ticket that Foster and Co. had contracted with some member of the Stock Exchange to pay 144*l.* 7*s.* 6*d.* for the purchase of an equal number of shares, then considered by them, erroneously, to be a beneficial property; and they knew that Foster and Co. put forward the name of Goss as the person into whose name the shares were to be transferred.

Whether Sandeman & Co., before causing their client, the plaintiff, to transfer the shares into the name of Goss, ought to have made inquiries as to who and what Goss was, and whether they are liable to their client for negligence in not doing so, are questions on which it is not necessary in this case to decide, but which must be thought of when considering what is the effect of the contract for the account. In fact Sandeman & Co., acting, I believe, in that respect like other brokers, took the matter for granted, and supposed the name given by Foster & Co. all right. They caused their client to execute a transfer to Goss. They, on the 31st of May, 1866, delivered that transfer to Foster & Co., who duly paid them the 144*l.* 17*s.* 6*d.*, and they credited the defendant with that amount.

It appears by necessary inference, though not expressly stated, that there was a satisfactory settlement in account between all the various members of the Stock Exchange through whose hands the ticket had passed as to the different, and probably very different, prices at which they had bought and sold. On the 13th of April, 1867, more than ten months after the defendant had every reason to believe the transaction was satisfactorily ended, the plaintiff, for the first time, brought forward facts then recently discovered by him. These are stated in paragraph 25 of the case, by which it appears, in brief, that Foster & Co.'s client, Sir Samuel Spry, being desirous of evading the liability which he had instructed

Foster & Co. to incur on his behalf, had sought out Goss, a person who, as James, V.C., in *Castellan* v. *Hobson* (1) expresses it, on account of his vacuity might sing in the presence of a vice-chancellor, and paid him 4*l.* 10*s.* to allow his name to be sent in as the transferee. Of course Goss has not paid the subsequent calls; the plaintiff has been forced to do so, and the right of action against Goss having been from the first worthless, he sought for redress. His first attempt was, on the 13th of April, 1867, to apply to the Committee of the Stock Exchange, but they declined to interfere, and now he comes to a court of law.

I think no one can read the above statement without feeling that the plaintiff is entitled to relief from somebody. He has selected the defendant Paine as the person whom he sues. And what we have to determine is whether the defendant is liable. The majority of the Court below have held that he is not, and I have come to the same conclusion as the majority of this Court, viz., that the judgment should be affirmed; but for reasons of my own, which I think it right to state fully, though the consequence is inconvenient length. The question raised by the appeal is, whether under the circumstances stated in the case, the defendant has so far as regards these ten shares, fulfilled the contract made by him. The answer to that question depends on a question of mixed fact and law, namely, what that contract was.

I think it desirable to consider, in the first instance, what would have been the legal effect and consequence of a contract similar to that made in the present case if made for cash on the Stock Exchange, or made off the Stock Exchange altogether, and then inquire what difference is produced by its being made on the Stock Exchange, and for the account. Now, I apprehend that a contract made for the sale of 100 shares in a specified company, at a particular price (if not qualified by any special agreements or customs), would require the person who had contracted to sell, or rather to supply the shares, to be ready and willing in a reasonable time after making the bargain, to give to the buyer the full benefit of the ownership of the specified number of shares in the company named; but he would not be required to give him any particular shares inasmuch as the contract was not for specified shares. Nor would he be required to give him shares which stood in his own name. It would be a fulfilment of the contract on his part if, as was the case in the other action between these same parties, *Maxted* v. *Paine* (first action) (1), he was able to procure a transfer of shares standing in the name of a third party, whom he could either induce or compel to be at the right time ready and willing to transfer the ownership in fulfilment of this contract. And on the other hand, the buyer would be bound not only to pay the price and to accept the benefits of ownership, but also to relieve the seller from all the burthens of ownership. Where the shares are not paid up in full, this last object is effectuated when the shares are transferred by deed to some one who executes the transfer, and that transfer is registered, and consequently, in an ordinary case, the contract of the buyer is to procure that the transfer shall be executed by a transferee, and that the transfer shall be registered so as to relieve the registered owner of the shares tendered in fulfilment of the contract from all liability to future calls.

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(1) Law Rep. 10 Eq. at p. 50.

In many companies the articles of association reserve a right to the directors to refuse to register a transfer, unless satisfied with the transferee, and as (according to the view I take of the matter) the buyer selects the name into which the shares are to be transferred, he is bound by his contract to select a person with whom the directors will be satisfied, as otherwise he does not fulfil his obligation to relieve the registered owner from all future liability.

But I think that (in the absence of some express stipulation, or what comes to the same thing, of some custom to that effect incorporated in the contract) there is no obligation on the person who has agreed to buy the shares to have the transfer made out in his own name, or registered in his own name, and consequently that the person who has agreed to sell has not the right to object to execute a transfer to a nominee of the buyer, any more than the vendor of real estate could object to execute, when required, a conveyance, on the ground that it was not a conveyance direct to the person with whom he made his contract, or the vendor of goods could refuse to deliver them to the order of the purchaser, and insist on delivering them to the purchaser himself. He has a right to require his contractor to procure the transfer to be executed by his nominee, and to be registered after execution so as to relieve him from all future liability, and he has a right to hold his contractor personally liable if this is not done, but in my opinion he has no right to dictate to the contractor whether he shall do this by taking the shares in a nominee's name or in his own.

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(1) Law Rep. 4 Ex. 81.

This is a position which, I think, has in the present case an important bearing on the ground on which my Brother Cleasby gave judgment in the court below; and I understand that the very foundation of that of my Brother Lush is, that, by the usage of the Stock Exchange, the ticket is not valid unless it contains as transferee the name of the person who, as principal to the member issuing the ticket (in this case Foster & Co.), actually made the contract, in this case Sir Samuel Spry. It is right to give my reasons for holding this opinion, and I think it the more necessary to do so because in *Coles* v. *Bristowe* (1), Lord Cairns, in delivering the judgment, commenting on an admission that the contract for the account made with a jobber did not require the jobber to register a transfer in his own name, observes, "This admission goes far in our opinion to take the case out of the ordinary class, in which there is no intervening jobber (where the vendor can clearly require the purchaser to accept and register a transfer in his *own* name) and to fix the position of a jobber as an intermediate or third person who undertakes to bring forward a purchaser who will take the shares from the vendor."

Two opinions are indicated in this statement, one that the contract of a member of the Stock Exchange, who is a jobber, is different from that of a member who is not a jobber; or, in other words, that if Sandeman & Co., in this case had chanced to deal with Barry & Co., who were brokers, instead of dealing with Paine, who is a jobber, Barry & Co. might be liable, when Paine would not, and that Barry's liability to Paine is greater than Paine's to Sandeman, a position in which I do not agree. When I come to inquire what difference the custom of the Stock Exchange makes in a contract for the account, I will state my reasons for this. The other opinion is that which is indicated in the parenthesis, that the vendor can clearly require a purchaser to accept and register a transfer in his *own* name. This was not the point to be decided in *Coles* v. *Bristowe* (1), but it was of considerable importance as a link in the chain of reasoning in support of that judgment. And I need not say when I found that Lord Cairns took this for granted I was induced to pause; and though, after a good deal of thought and some research, I am convinced that there is an error in this position, I express that opinion with reserve till I hear the reasons to be assigned in support of it.

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(1) Law Rep. 4 Ch. at p. 10.

The following authorities and considerations are what occur to me in support of my position, that the person contracting to buy is bound to procure that the transfer which he has requested to be made to his nominee shall be executed and registered by that nominee so as completely to relieve the transferor from all future liability in respect of the ownership of those shares, or, in default, is personally liable for all damage sustained in consequence, though he has required the transferor to execute a transfer *not* into his own name.

This was the ground on which the majority of the Common Pleas proceeded in *Grissell* v. *Bristowe* (2); and Malins, V.C., in *Coles* v. *Bristowe* (3), both treating the practice of the Stock Exchange as no more than machinery by means of which the person contracting to buy procured a nominee. The courts of appeal, in each of those cases, determined that the practices and usages of the Stock Exchange were more than such machinery, and made it part of the contract, when the sale was for the account, that there should be a novation; but they did not determine that, if the courts below had been right in their view of the effect of the usages, the decisions below would have been wrong. And it seems to me that they would in that view have been right, both on principle and on authority. In *Humble* v. *Langston* (4), Parke, B., in delivering the judgment of the Court, states what was the course if a contract for the supply of shares (not subject to any custom) was to be precisely followed out. "The plaintiff, after shewing a good title to the defendant, would have a right to call upon him to complete his purchase in a reasonable time, by preparing a deed in the statutory form; and if the defendant had done so the

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(1) Law Rep. 4 Ch. 3.
(2) Law Rep. 3 C. P. 112.
(3) Law Rep. 6 Eq. 149.
(4) 7 M. & W. 517, at p. 528.

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plaintiff might then have executed it and required the defendant to do the same, and to deliver, or attend with him to deliver, the deed to the company, that a memorial might be entered into and indorsed on the deed of transfer, pursuant to the 169th section. If all this had been done, the plaintiff would have been no longer liable to any call; if the defendant had refused to perform his part, he would have been subjected to an action for the non-performance of that which he had omitted to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount by way of special damage for the defendant's breach of contract."

This, I apprehend, is correct; but there are two remarks to be made, first, that in practice the production of the certificates is sufficient proof of the title to the shares; and, second, that the statutory form being very well known and very simple, the vendor in practice prepares the transfer as soon as he is informed into what name the shares are to be transferred; though in consequence of its being the purchaser's duty so to do, the purchaser always pays the cost of the transfer, consisting chiefly of the stamps.

The vendor, in *Humble* v. *Langston* (1) had, at the request of his purchaser, abstained from requiring him to pursue this strict course, and the Court of Exchequer decided that there was no contract at law to indemnify him, his only remedy being in equity, as it is expressed at p. 530: "The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the outgoings; but there is no authority for saying that the law makes any promise by a cestui que trust to a trustee, simply to repay all that the trustee may pay on his own account, still less on that of the subsequent cestui que trusts."

This latter part of the judgment was, however, reversed in the Exchequer Chamber, in the case of *Walker* v. *Bartlett* (2), where Wightman, J., in delivering the judgment of the Court, says; "the defendant, however, did not cause the shares to be registered in his name; and the plaintiff was, in consequence of his name being continued on the register, obliged to pay some calls; and the question before us was, whether the defendant was, under the circumstances of the case, bound to cause the shares to be registered in his *own name*, or, if he did not, whether there was an implied contract of indemnity by him to the plaintiff. With respect to the first point, we think that there was no obligation on the part of the defendant to cause the shares to be registered in *his* name as owner. The form of the document [i.e., the transfer, which in that case was not required to be under seal] in which the name of the proposed transferee was in blank, shews that it was perfectly understood between the parties to the contract that the defendant should not be bound, unless he liked it, to register the shares in his own name, but that he might transfer to some other person the same right that he had; and the second point then arises, whether if the defendant does not choose to avail himself of that power, which for his benefit and convenience is made optional with him and not with the plaintiff, there is not an implied contract on his part to indemnify the plaintiff against the consequence of his (the defendant's) suffering the plaintiff's name to be continued on the register, after he has done all that the nature of the contract between him and the defendant, and of the property which was the subject of it, would require him to do, to convey a perfect title to the defendant."

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(1) 7 M. & W. 517.

(2) 18 C. B. 845, at p. 861; 25 L. J. (C.P.) 263, at p. 265.

2 Jur NS 644.

The Court of Exchequer Chamber decided that there was, and that the plaintiff was entitled to recover on the first count, which alleged the contract to be, on the plaintiff's part, to execute and deliver to the defendant a transfer generally, not a transfer to the defendant himself. And it is obvious that to put any other construction on the contract would be very inconvenient. It would prevent the making of a contract for the purpose of applying the shares to the fulfilment of an obligation already contracted to supply shares to another, as, for instance, to vest them in the trustees of a marriage settlement; and it would render it impracticable for two brokers to deal with each other as principals for a sale for cash, when, in fact, each was acting for an undisclosed principal, and this would be without any corresponding benefit to the vendor. For it is obvious that so long as the supplier of the shares has the personal liability of his contractor, who is bound to see that by the registering of the transfer the burthen of the

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ownership is removed from him, it is immaterial to him whether that object is to be obtained by registering one name or another. If it is done he is free, if it fails he still has the personal liability of the original contractor, and in no case could he under the contract have more. If, indeed, the execution of a transfer to the nominee had the effect of relieving the contracting party from liability, and obliging the person contracting to supply the shares to look to the nominee alone for redress, it would obviously be of importance to refuse to execute a transfer to any unknown nominee; but it seems to me clear that the execution of that transfer cannot have such an effect. In *Cruse* v. *Paine* (1), Giffard, V.C., after pointing out that the contract for the sale, or rather the supply of shares, standing by itself, entitled the purchaser to the benefit of the property in the shares, and consequently that he would, in a court of equity, be considered as owner, and as such bound to indemnify the vendor against all calls, proceeds to say: "Surely it cannot be said that, if there is a contract between the plaintiff and the defendants, which makes them distinctly liable to the plaintiff in respect of these shares, and puts them in the same position as though they were shareholders instead of him, the mere fact of his having executed at their instance a transfer, can alter the liabilities of the one or the other? I apprehend, in order to alter those liabilities, you must aver and you must make out this, that there has been another and new and different contract entered into, and that the nature of that other new and different contract is, that it is to be substituted for the first contract; that, in point of fact, there has been what is termed a 'novatio.'" In this I quite agree.

In *Coles* v. *Bristowe* (2) Lord Cairns asks in the course of the argument, "If I agree with the owner of a leasehold house to buy or find a buyer for it on the 1st of January, and I do find a buyer, who is to indemnify the owner against the covenants?"

I speak with diffidence as to a point on conveyancing with which I am not familiar, and on which, it not having been argued, I have not had the assistance of the bar, but I apprehend that the person who made the contract would be bound to indemnify the owner, and consequently that the owner might insist on his entering into a covenant to that effect. But if the purchaser tendered for execution a conveyance by which the lease was to be transferred to A. B., and the purchaser, by the same deed, covenanted with the owner to indemnify the owner of the lease, I cannot think that the owner could refuse to execute it, and insist on the purchaser rendering himself liable to the landlord, for, unless from the terms of the lease the landlord had a right to object to an assignee, it would be quite immaterial to the owner who A. B. was. If the landlord had such a right it would be necessary that A. B. should be one whom the landlord would accept.

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(1) Law Rep. 6 Eq. 641.

(2) Law Rep. 4 Ch. 6.

Now, if I am right in the view I take of the decision in *Walker* v. *Bartlett* (1), the seller of the shares has what is equivalent to the personal covenant of his purchaser to indemnify him. And unless the company, from their constitution, had a right to object to a transferee it would be quite immaterial to the vendor of the shares who the transferee was, provided he was of full age and competent to accept a transfer. I do not mean to express any doubt that if the result of the transaction was that the relation of trustee and cestui que trust was created between the vendor and that transferee, it would be important to the trustee to have a solvent cestui que trust; but that would arise not from the contract of sale but from the subsequent transaction which created the relation of trustee and cestui que trust. Nor do I mean to express any doubt that those transactions might be such as to be in effect equivalent to a transfer from the owner in his capacity of owner to himself in his capacity of trustee, and so fulfil the contract; but, unless such was the case, I think the mere execution of a transfer to a nominee would not release the original contractor from his liability. There may very well be what Giffard, V.C., calls a "novatio." A familiar instance is that which often takes place where there is a change in a firm, one partner retiring and a new one coming in. There the customers of the firm, the outgoing partner and the incoming partner, often do come to an arrangement by which the customers agree to discharge the retiring partner and accept the new firm as their debtors: see *Hart* v. *Alexander*. (2)

The case, as I understand it, of *Shaw* v. *Fisher* (3) was one of

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(1) 18 C. B. 845; 25 L. J. (C. P.) 263; 2 Jur. N.S. 543.

(2) 2 M. & W. 484.

(3) 5 De G. M. & G. 596.

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novation. There, Fisher having purchased specific shares sold by the plaintiff's broker at auction afterwards agreed with Carmichael to sell him his bargain. The plaintiff's brokers consented to this and returned the name of Carmichael to the plaintiff as the purchaser; the price was paid and the shares transferred into the name of Carmichael. A year afterwards, when the calls were made and Carmichael had failed, the plaintiff, who up to this time had never heard of Fisher's name, discovering the facts, filed a bill against Fisher for a specific performance. He failed on the ground that Carmichael was not a mere nominee of Fisher, and that whether the plaintiff had or had not a right to redress against his broker for doing what he did, there had been a substituted contract, that there was what Giffard, V.C., calls a "novatio." And I may observe at once that I consider *Grissell* v. *Bristowe* (1) and *Coles* v. *Bristowe* (2) as deciding that when matters had gone so far as they had in those cases, they established a "novatio;" and I think that the decision in *Cruse* v. *Paine* (3) is, in effect, that the defendant's guarantee of registration prevented the "novatio."

There is only one point more necessary to notice before proceeding to consider the effect of the Stock Exchange customs as to a sale for the account.

At the time when this contract was made, the company, Overend and Gurney, Limited, had stopped, their books were closed, and both parties were quite aware that after that, registration of a transfer was impracticable. As the sale was at 17*l.* discount, only 15*l.* having been paid up, the purchaser, instead of, as is usual, paying money for the benefits of the ownership and accepting the burthens as a consequence, was to be paid money for accepting the burthens and had the benefits given to him to boot. This shews clearly that the main object of the plaintiff was to be relieved from liability; but the contract was in other respects the same as usual, except that both sides knew that the register of a transfer, so as to relieve the registered owner from primary liability to calls, was impracticable, and that the exoneration of the plaintiff from such liability must remain in contract. Mr. Manisty, in his argument, pointed this out, and relied on it strongly, as shewing that the customs of the Stock Exchange, with reference to a sale for the account, were not applicable to such a contract at all. I agree with him so far as to think that if the defendant had entered into a contract of this kind (without qualification from custom or otherwise) he could not have got rid of his liability to indemnify the plaintiff against future calls by procuring the registration of the transfer to a nominee; but he might get rid of this continuing liability by a "novatio," by procuring a substituted contractor willing to engage to be liable in his place, whose liability the plaintiff was willing to accept instead of the defendant's, or whose liability he, the defendant, by virtue of his contract with the plaintiff, could compel the plaintiff to accept instead of his, the defendant's. And consequently I think that in the present case the question is, whether the nature of the contract to sell "for the account" is such as to shew that, under the circumstances stated in the case, the defendant has done so much as to be in a position to say that the plaintiff was either bound, under his contract, to take the liability of a third person as substituted contractor for the defendant, or has actually accepted such liability whether bound to do so or not, or has so conducted himself as to give the defendant a right to preclude him and treat him as if he had accepted such substituted liability.

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(1) Law Rep. 4 C. P. 36.

(2) Law Rep. 4 Ch. 3.

(3) Law Rep. 4 Ch. 441, on appeal.

Having said thus much I am now brought to what is the great question in the cause. What difference does it make that the contract was on the Stock Exchange *for the account?* I have no doubt that the plaintiff, now seeking to enforce a contract made on his behalf, must take the contract as it really was, incorporating in it all the usages relative to such contracts. And the questions, what are those usages, and what is their extent, and what do they mean, are all questions of fact to be ascertained by evidence. But when once they are ascertained the legal effect of the customs upon the contract is a question of law. Now, in *Grissell* v. *Bristowe* (1), the majority of the Court of Common Pleas, deciding on the facts agreed on by the parties, and stated in a special case, came to a conclusion from which the Court of Exchequer Chamber differed. And in the case of *Coles* v. *Bristowe* (2) Malins, V.C., acting on the facts alleged and admitted in the bill and answer before him, and on the evidence produced before him, came to a conclusion from which the Court of Appeal in Chancery differed. Those decisions in the Court of Exchequer Chamber and of Appeal are the decisions of courts of co-ordinate jurisdiction with this, but no doubt proceeding on the facts in those cases. I think it open to the parties in any case that may arise to prove that the facts stated in those cases as to the customs of the Stock Exchange were inaccurate or incomplete; but no attempt has been made in the present case to do so, and I think that we are as much bound by the decision of a court of co-ordinate jurisdiction, as to the legal effect of the same facts, as we should be by any other decision of such a court. I think, therefore, that the question in the present case is concluded in this court so far as the decisions in those two cases proceed, and consequently that it is to be treated as settled, that if the circumstances were the same as in those cases, the defendant would be discharged. But the circumstances are not precisely the same, and what we have to determine is, whether the difference in the circumstances makes any difference in principle; and for that object it is necessary to inquire what the customs and usages of the Stock Exchange really are.

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(1) Law Rep. 3 C. P. 112; Ibid. 4 C. P. 36.

(2) Law Rep. 6 Eq. 149; Ibid. 4 Ch. 3.

The materials which we have before us are, in the first place, the written rules of the Stock Exchange in force at the time when this contract was made, viz., in 1866. They have, as I learn, been in some respects altered since that time; I do not know whether in any respects material to the questions raised in this case, but I mention the fact, because it is well to state distinctly, in case any question should arise hereafter on a contract made after the rules were altered, that the rights of the parties must, in my opinion, depend on the effect of the rules in force at the time that contract was made, and not on the effect of the rules in 1870. And besides those written rules, we have the evidence as to the practice, and, as I may call it, the unwritten comment on those rules from the usage of those who in everyday use apply those rules. This also may change, but this contract must be understood according to what was the accepted understanding amongst those dealing on the Stock Exchange in 1866. And I may state at once that, in my opinion, the whole difficulty in these cases as to bargains for the account arises from this, that those who framed the rules, and those who by putting them in use have established a practice and understanding which ought to regulate the rights of the parties, have mainly had in contemplation the establishment of a clearing-house, for which they have provided with admirable skill, and they have also provided for other matters of everyday occurrence, such as the payment of the price, and the enforcing of the actual delivery of the transfers, though not perhaps quite so skilfully. But I think that they have not at all had in contemplation the subject of the indemnification of the vendor against future calls, and the courts are therefore in this, as in many other cases, obliged to determine what was the contract depending on the intention of the parties with reference to a state of things which, when those parties made the contract, was not in their contemplation, and as to which, therefore, they have not clearly expressed any intention, because in truth, not thinking of the matter, they had no intention to express.

In trying to do this, great hardship must often be inflicted on one side or the other. The courts of appeal in *Grissell* v. *Bristowe* (1), and *Coles* v. *Bristowe* (2), were much influenced by the consideration that if the usages were so con~~triv~~ed as to fix the member of the Stock Exchange who entered into a contract such as the defendant has made with a liability to carry out the contract for all time, and see that the seller of the shares was really relieved from future responsibility in respect of the shares, they would impose upon all jobbers who had dealt in such shares a liability which they never supposed they undertook, making the trade of a jobber a very perilous one, and that the effect would be to reduce to unexpected bankruptcy a large class of respectable men. I believe this would have been the effect of such a decision. I suppose no one will dispute that this would have been a great evil, and one to be avoided if possible. But then, on the other hand, it is to be remembered that there are two parties to a contract, and that if such a construction is put upon the usages as to make the contract in favour of the vendor merely illusory, and produce the result that a person in the position of the plaintiff, who has paid money to the defendant in order to get rid of all

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(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. 3.

future liability on those shares, has either nothing at all for his money, or at least only recourse against a person of whom, at the time of the contract, neither he nor his broker had ever heard, and who may be without means, I suppose no one will dispute that this also is a great evil, and to be avoided if possible.

I will now proceed to state what I understand to be the effect of the rules and usages of the Stock Exchange. The great and main object of the members of the Stock Exchange in establishing a periodical account and making their rules as to name days and settling days and tickets seems to me to have been the same as that which has led to the establishment of the clearing-house, and which I take to be this, that the number of actual transfers and payments should be reduced to a minimum, and that all that can be done by setting off one contract against another, and settling them in account without any actual transfer or payment of cash, should be done. And notwithstanding what I cannot help thinking the mistaken objections of the lawyers of the past generation against settling matters in account, I think this is a laudable and convenient object.

A member of the Stock Exchange may be a jobber, the nature of whose business it is to sell stock or shares just above the market value, and to buy just below it, and make his profit of the turn of the market. If he could arrange his dealing so that he should have to deliver to various buyers shares at a higher price, and receive from various sellers the precisely same number of shares at a lower price, and could set the one against the other, and merely receive the difference of the prices, the convenience to him would be obvious.

I suppose jobbers cannot always bring their contracts so precisely to a balance; and though by taking in for each other in the way described in the recent case of *Allen* v. *Greaves* (1) they succeed in reducing the quantity, yet sometimes they have a balance of shares which they must either actually supply or actually receive, as the case may be.

A member of the Stock Exchange may also be a broker, who has principals, though their names are never disclosed, and the

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(1) Law Rep. 5 Q. B. 478.

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member of the Stock Exchange makes the contract as principal, and is personally liable as such. If a broker has made only one contract for one constituent to sell, and has made only one contract for another to buy, he will require from the person with whom he has the one contract to sell that he should actually relieve his selling constituent of the shares sold, and he will require from the person with whom he has a contract to buy that he shall actually supply his buying constituent with the shares bought, so that in that simple case there is no room for economy in the number of shares actually transferred. But if, as is very commonly the case, the broker has a speculative constituent who enters into many contracts, some to buy and some to sell, in the hope that he may get a profit from the fluctuation of the market, or if he, the broker, has carried over some of these transactions to the next account, it is obvious that the broker will on the behalf of that constituent only wish for the transfer of the balance of such shares.

The interest, therefore, which a broker member of the Stock Exchange has in establishing the principle of the clearing-house is the same in kind, though not so extensive in degree as that which a jobber member has.

In order, therefore, to effectuate the clearing-house object the system of "tickets" has been introduced. The 87th rule (1) requires that the "buyer" of shares, &c., shall pass a ticket for the same containing the names and address of the buyer in full before twelve o'clock on the name day, either in the Stock Exchange or at the office of the seller.

Taking the words of this rule literally without the explanation afforded by usage, it would seem that the buyer who was to pass the ticket, and the buyer whose name was to appear on the ticket were to be the same person, but that construction would totally defeat the object of the Stock Exchange. What is meant is obviously that the member who has contracted to buy, or rather to accept shares from another member, shall pass to him a ticket issued by any member of the Stock Exchange (either the passer or any other), on which ticket shall appear the name and address in full of that person, whose name has been supplied by the issuer of the ticket as being the name into which the transfer was to be made.

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(1) Set out Law Rep. 4 C. P. at p. 54.

The member into whose hands that ticket is passed may either hold it himself or pass it on in furtherance of a contract made with another member. Thus, when in the present case, Barry & Co., in furtherance of their agreement with Paine, passed to him the ticket originally issued by Foster & Co., containing on it the name and address in full of Goss, Barry & Co. complied with the 87th rule, by as buyers from Paine passing to him, who was their seller, a ticket issued by Foster & Co., containing the name and address in full of Goss as the person into whose name the shares were to be transferred.

It is the opinion of my Brother Cleasby in the Court below, and of my Brother Lush in this Court, that Foster & Co. had not originally complied with the rule when they issued the ticket, because they ought, instead of inserting the name of Goss, to have inserted that of Spry. In this I do not agree; but even if it was so, none of the other members of the Stock Exchange through whose hands the ticket passed, either knew or could know anything about this. At all events, Barry & Co. passed to Paine what purported to be a ticket such as is meant by the rule. Of course, in putting this construction on the rule, I proceed on the ground that I think that the members of the Stock Exchange have used the word "buyer" in one sense in the first line of the 87th rule, and in another in the third line of the rule, and consequently that I think I find the mercantile community are not more careful in the use of language than we often find those to be who frame Acts of Parliament.

Paine, when he passed this ticket to Sandeman & Co., also complied with the rule. It is obvious that in carrying out this arrangement it may happen that a member becomes possessed of a ticket for A and B and C shares when he is under contract to buy from one member A shares, from another B shares, and wishes himself actually to deliver C shares, and consequently wishes to pass to his two sellers two separate tickets for A shares and B shares respectively; and himself to continue holder of a ticket for C shares. To meet this case a power of dividing or splitting the ticket is given, which is mentioned in the 87th and 91st rules. (1)

No question arises on that power in this case, and it is only material as shewing the main object of the rules, and how skilfully they have been devised for effectuating that object.

It is obvious that if this course is followed out, a member of the Stock Exchange (whether broker or jobber) who is desirous of taking actual delivery of any number of shares which he has agreed to buy, is, on the name day, to issue to his seller a ticket containing his (the issuing member's) name, and specifying the sum which he (the issuing member) is to pay for those shares on delivery of them, and stating in full the name and address of the person into whose name he (the issuing member) desires those shares to be transferred; and that a member of the Stock Exchange who has sold shares which he desires actually to transfer must, at the end of the name day, be holder of a ticket either in its entirety as originally issued by a member of the Stock Exchange, or split in the manner above specified. There may be a great many intervening members between the two. The ticket which the member A. holds at the end of the name day, bearing on it the name of the member Z. as the original issuer, and which contains the name and address of either a member or a non-member as the person into whose name Z. intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times; and the issuing member may have been a jobber or a broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or a jobber. Still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the Stock Exchange.

I need not dwell on the provisions in the rules framed for the purpose of securing that such tickets shall be passed on the name day; they are a little complicated, but seem to me quite sufficient for their purpose, and in this case they were effectual. Sandeman

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(1) Set out Law Rep. 4 C. P. at pp. 54, 55.

& Co., as holders of the ticket, were brought into communication with Foster & Co. as issuers of that ticket, and they mutually dealt with each other as such. I incline to think that in such a case the law would imply (or, if not, a jury might, and I would, without hesitation, find as a fact) that there was a contract between the holder and the issuer of the ticket to perform the reciprocal duties which they owe to each other as such.

This contract, in the language of a pleader before the Common Law Procedure Act, would have been thus expressed: "In consideration that the holders of the ticket (that is, in this case, Sandeman & Co.), at the request of the issuers (that is, Foster & Co.), promised to treat them as the issuers and perform to them all things which the holder ought to perform to the issuer, they (Foster & Co.) then promised Sandeman to perform to them all things which the issuer ought to perform to the holder."

If the parties entering into this contract were agents (as Sandeman & Co. were for Maxted, and Foster & Co. were for Spry), I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents, and entitled to have the same benefit of the contract.

The contract would be implied very much on the same principle as that on which the assignee of a bill of lading receiving the goods is held to contract with the shipowner to pay him the freight originally due from the assignor of that bill of lading.

And the convenience of it in the present case may be made clear by supposing A. to hold a ticket issued by Z., which had passed through the hands of members whom we may designate by the other letters of the alphabet, and that Z., without any valid reason, refused to pay. If there is no privity between A. and Z., it will be necessary, in order to enforce the performance of Z.'s duty, for A. to sue B., B. to sue C., and so on, till ultimately Y. will sue Z., who will thus, at the expense of twenty-five lawsuits, be compelled to perform his duty by a process very troublesome and costly, whilst if there is privity between A. and Z., it may be enforced by a direct suit between those parties. And this imposes no hardship upon the issuer of the ticket, as it only places him in the same position relatively to the holder of it in which he would have stood towards his first vendor if that vendor had never passed away the ticket, but had himself delivered the shares direct.

The reasoning of Christian, L.J., in *Sheppard* v. *Murphy* (1), seems to me to proceed entirely on this principle. There Lowndes & Co. were the brokers who issued the tickets, on which they placed the name of Murphy as transferee, and Murphy was their principal. They passed that ticket to Kennedy, a jobber, and from him it was passed to Sheppard, who was the ultimate holder of the ticket. Sheppard (who stood in the situation which Sandeman & Co. hold in the present case) instituted the suit against Murphy. The Court below had decided that there was no privity between Sheppard and Murphy. The Court of Appeal reversed this. The reasoning of Christian, L.J., as I understand it, is that privity of contract was established between Lowndes & Co., as the issuers of the ticket, and Sheppard as the holder of the ticket, and that consequently there was privity between Murphy and Sheppard, not because Murphy's name was given in, but because Murphy was the principal of Lowndes.

The case of *Lord Torrington* v. *Lowe* (2), at first view, seems in conflict with this. There Lowe stood in the same relation to Lord Torrington as in the present case Spry does to Maxted. And the Court of Common Pleas, assuming that the original buyer from Lord Torrington's broker was liable to him, which, according to *Grissell* v. *Bristowe* (3), then not reversed, was the law, held that there was no privity between him and any one other than that created by the execution of the deed of transfer to which Lowe was no party. It is not necessary to overrule this decision, as it is not directly in question; but it has a material bearing on the rest of my argument. I think it right to say I do not think it was right, though the fault may have been in the way the case was stated. For though no doubt in fact the course of business was the same as that described in the present case, and Lo~~wndes~~' case brokers, Spencer and Norton, had issued a ticket, of which Lord Torrington's brokers, Lawrence & Pearce, had become the holders, and though the statements in par. 5 of the special case in *Torrington* v. *Lowe* (2) may perhaps now be so understood, yet it is

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(1) 2 Ir. Rep. Eq. 544.

(2) Law Rep. 4 C. P. 26.

(3) Law Rep. 3 C. P. 112.

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plain that neither the Court of Common Pleas, nor the counsel who argued the case, so understood the statements. The question whether there was any implied contract between the issuer and the holder of the ticket on which would depend the question whether Lowe was liable at law to Lord Torrington was not presented to them. And though I am bound in candour to admit that there are expressions which lead me to believe that if it had been the decision would have been the same, yet I have much less scruple about—even in the Court of Exchequer Chamber—expressing my dissent from that decision than if the point had been considered.

The recent case of *Castellan* v. *Hobson* (1) decides that in equity Lord Torrington might have made Lowe liable, and it seems to me that there is no reason why the liability should be different in law and in equity. But even assuming that I am right in thinking that there is privity between them and a contract to perform their reciprocal duties, there still remains an important question, viz., what are their reciprocal duties? The general effect of the usage is, I think, that which is expressed by Cockburn, C.J., in *Grissell* v. *Bristowe* (2): "In the end the transaction becomes one which is to be carried out between the last vendee" (i.e., the issuer of the ticket) "and the original seller, as though such vendee had purchased immediately of such seller." This would, I think, be precisely accurate if it were not that the prices vary, and that the different members through whose hands the ticket has passed are liable to pay and entitled to receive different sums. In the present case it appears that Foster & Co.'s immediate vendor was entitled to receive 14*l.* 10*s.* per share, and Paine's immediate vendor, the now plaintiff, instead of receiving anything, was to pay 2*l.* per share for getting rid of the shares. It might have been the other way, and that the issuer of the ticket was to receive money for taking the shares, and the holder to be paid for parting with them. Such violent fluctuations in the price are, I suppose, rare, but in all cases there are fluctuations in price during the account, and the sums to be paid and received by the different members through whose hands the ticket has passed are not the same.

/10/ (1) Law Rep. ~~8~~ Eq. 47.

(2) Law Rep. 4 C. P. at p. 43.

The 62nd rule (1) shews that the members are personally liable to each other for those payments, and that the Stock Exchange wished (though it was beyond their competence to do so) to prevent their being liable to any non-members who were principals. The purchaser has a right, before he parts with his money, to have the shares transferred, and the vendor has a right, before he parts with the shares, to have his money paid. Those two, on the general principles of the law of contract, would be contemporaneous acts, and the vendor would, in the absence of any agreement to the contrary, have a reasonable time for preparing the transfer after he was made aware of the name of the person to whom the shares are to be transferred. I think the effect of the 98th rule (2) is to substitute ten days for that uncertain reasonable time. The 80th rule seems to indicate a practice by which the members are entitled to receive at once, from those to whom they have sold, the differences in price beyond that marked on the ticket before the transfer is delivered, subject to some qualifications not now material. The 79th rule is material. It runs thus: "A member having sold stock or other securities, *and transferred or delivered the same* according to the tickets or directions given him by the buyer, has a right to demand payment from such buyer, and in case the seller apply to the member whose name is on the ticket, and is either refused payment or receives a cheque which is dishonoured, the buyer shall make immediate payment." This, as it seems to me, indicates that though for convenience the payment up to the amount stated on the ticket is to be made by the member who issues it and is expressed on it to be the member who pays, yet the original contractor with the holder of the ticket is still liable, and consequently that there can be no novation until all the payments are actually made or settled in account, and so it is expressly held in *Coles* v. *Bristowe.* (3)

The rule just cited is made for the purpose of securing payment where the shares have been delivered according to the directions of the ticket. The 96th rule (2) by the first part of it provides for something which (perhaps from want of sufficient information as to the mode in which payments are settled), I do

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(1) Ante, p. 148. (2) Set out Law Rep. 4 C. P. 56.

(3) Law Rep. 4 Ch. at p. 12.

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not quite understand. The latter part is thus expressed: "and if the stock or shares be not delivered within fifteen clear days the issuer of the ticket shall alone remain responsible." This seems to me clearly to indicate, first, that the issuer of the ticket (Foster & Co.) is, according to the understanding of the Stock Exchange, responsible where the transfers are not taken and paid for; and second, that after the lapse of fifteen days without complaint other members whose names are on the tickets are to be free from responsibility. The 99th rule (1), which is framed for the purpose of enforcing delivery of the shares, in like manner provides that the lapse of fifteen days without any attempt to buy in shares shall release the seller (by which I understand in this rule the member immediately contracting with the member who has not bought in) from all loss caused by the failure of any member through whose default the shares were not delivered.

This shews that the liability of the seller to deliver continues after the delivery of the ticket, and that there is no "novatio" merely from the passing of the ticket. And this also is expressly held in *Coles* v. *Bristowe*. (2)

Taking these rules together it seems clear that the object of the framers was, that the transfer should be made into the name supplied by the issuer of the ticket, that the transfers thus executed should be handed to the issuer of the ticket, and that the prices should be paid, and that each member should be responsible for the performance of his own part, and that as far as possible they should have nothing to do with outsiders.

I cannot in those rules or in the statement of usage discover any trace of a difference as to the liability of a broker member, and that of a jobber member. On the contrary, it seems that their contracts and their duties towards those with whom they contract are identical, though the motives inducing them to enter into the contracts may be different.

This is the reason for my dissent from what seems implied by the words of Lord Cairns, in *Coles* v. *Bristowe* (2), which I have before quoted. Up to the time when the payments are settled there is great difficulty in seeing how there could be any "novatio" between the holder and issuer of tickets, because the prices which they are to pay and receive are different. And in *Hawkins* v. *Maltby* (1) the plaintiff ultimately failed, because he did not perceive the materiality of this, and did not shape his bill accordingly. And up to the time of the transfers and certificates being handed over to the issuer of the ticket, there is no obligation on him to pay the price, and the terms of the 99th rule above referred to shew that in case of default in the delivery of the shares, the seller is not discharged from liability to his buyer, and consequently there can be no "novatio" till then. But the rule also plainly indicates a very business-like and sensible desire to have everything settled promptly, and to provide as far as possible that after the lapse of fifteen days from the date of the ticket without complaint, every member who is not himself guilty of personal default shall be free from responsibility. And it seems to me that the system of the Stock Exchange could not possibly work unless this was so. The holder of the ticket who is to deliver the shares, and the issuer of the ticket who is to take them, may without any impropriety, as between themselves, agree to postpone the actual completion of the transfer, and continue it (as it is called) to the next account, or they may exonerate each other, one of them accepting a sum of money from the other for so doing. The intermediate parties to the ticket have no interest in hindering them from pursuing either of those courses, provided it does not keep alive their liability, and they have no means of knowing whether the transaction has been completed by actual transfer and registration of the shares, or postponed by carrying over the contract, or finally put an end to by an exoneration. The principle is stated in *Freeman* v. *Cooke* (2) that "conduct by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the effect of precluding" the party failing to make the disclosure from afterwards relying on it. And I am much inclined to think that on this principle an omission on the part of the member holding the ticket, to disclose in due time to the intermediate parties on that ticket, that there had been a failure in the performance of the duty of the issuer of the ticket, would preclude the holder (and of course his principal, if he has one) from setting up that failure as against those intermediate parties. If I am right in the construction I put upon the 96th and 99th rules, the Stock Exchange have declared fifteen days to be the extreme time within which the member is to declare any failure on the part of the issuer of the ticket to accept and pay for the shares, or on the part of the holder of the ticket to deliver them, and have expressly provided that a failure so to do shall have the effect of preventing them from coming on the intermediate parties for those defaults. When, however, transfers have been actually executed to the person who is named by the issuer of the ticket, and those transfers have been handed over to the broker who issued that ticket, the seller has done everything on his part to be performed, and when the price has been paid everything on the part of the buyer has been performed, except the protecting the transferor from liability for any future burthen arising from the ownership of the shares, which has now become ascertained and specific. Where the shares are paid up in full this is of no consequence at all, and where the shares are of a real value, bearing any considerable proportion to the unpaid calls, it is of little importance. In such cases as the present this protection from future liability is of the utmost importance. But all legislation proceeds on the principle of providing for the ordinary course of things:—In ea quæ frequentius accidunt, præveniunt jura. And the Stock Exchange in framing their rules have made provisions for the ordinary cases, and have omitted to provide for this exceptional case.

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(1) Set out Law Rep. 4 C. P. at p. 56.

(2) Law Rep. 4 Ch. at p. 12.

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(1) Law Rep. 3 Ch. 188.

(2) 2 Ex. 663.

Where the registration is practicable, as in the case of a solvent company, the breach of contract in failing to have the shares registered must in general take place within the fifteen days, and I see no difficulty in supplying the omission in the rules to provide for that case. The party who neglects within fifteen days to inform the intermediate parties on the ticket of a breach already occurred, should be held concluded from relying against them on such a breach. But where the company is being wound up, the registration, though not impossible, is impracticable, and the failure to indemnify the shareholder against future liability does not in general occur till long afterwards, and if the point was not already decided, I should feel a difficulty about this. But *Coles*

v. *Bristowe* (1), and *Grissell* v. *Bristowe* (2), seem to me to determine that, when the transfers have been delivered to the issuing member and the price is fully paid, there is a novation which frees the member who merely passed the ticket from further liability. And *Coles* v. *Bristowe* (1) further determines that this novation does not arise from the voluntary act of the seller in accepting the substituted liability of a third party in accord and satisfaction of the contract. Coles had in that case taken alarm, and given his broker instructions to complete the transaction with Bristowe direct, and not to recognize any sub-purchasers except as nominees of Bristowe. The evidence as to this will be found at p. 151 of *Coles* v. *Bristowe*, in Law Rep. 6 Eq. At p. 14 of the report of the case on appeal, in Law Rep. 4 Ch., Lord Cairns deals with this as an ineffectual attempt to vary a contract already made.

The case therefore decides that it is part of the contract for a sale for the account, that where the price has been paid and the transfers executed to the nominees of the member who issues the ticket, and the transfers have been delivered to the member who issues the ticket, the member passing the ticket is free from further responsibility. That decision, and the decision of the Exchequer Chamber of *Grissell* v. *Bristowe* (2), conclude the question so far, except in the House of Lords.

We, sitting in a Court of co-ordinate jurisdiction, must hold that there is a "novatio," and it only remains open to consider what that "novatio" is, and subject to what conditions.

It will be seen from what I have written that, in my opinion, the effect of the usage is that the member issuing the ticket is much in the position of one who has issued to his immediate contractor a promissory note, promising to perform to the assign of that promissory note those duties which he would otherwise have had to perform to that immediate contractor.

If there were no custom, the person contracting to take shares would promise to accept from his vendor a transfer, and to indemnify against future calls. The contract on the Stock Exchange for the account is to supply him on the name day with a ticket which he may either hold or pass on. Each member through

(1) Law Rep. 4 Ch. 3.

(2) Law Rep. 4 C. P. 36.

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whose hands the ticket passes is in a position analogous to the indorsee of that note, and the ultimate assignee, who is actually to deliver the shares, is in a position analogous to the holder of that note, and I think that the effect of the custom is, that unless what resembles notice of the dishonour of this note is given within fifteen days, the intermediate indorsers of the ticket are released, and then, and not till then, there is a novatio in my opinion between the two members of the Stock Exchange, who are in the position of holder of that ticket and issuer of it. The Stock Exchange could only regulate the proceedings of their members, but if either or both of those members were agents for others, the law says that the principals, though undisclosed, may sue and are liable to be sued to the same extent as their agents, and no more. And there is no hardship on either party in a practice thus understood.

The issuing member and his principal have no additional burthen or obligation thrown on them, the only difference is that they are liable for the fulfilment of the same duties to another person. The principal who instructed his broker to sell, authorized him to contract with any member of the Stock Exchange, and after the fifteen days have elapsed, he has the same rights against the issuer of the ticket, who must necessarily be a member, that he would have had against him if the contract had been in the first instance made with that member. And the convenience and security given to those who pass the tickets, by a custom which secures that the full extent of their liabilities on each account shall be finally ascertained within fifteen days, is obvious and great.

This is the conclusion I come to, which leads me to affirm the judgment below, on the ground that the defendant Paine has completely fulfilled his contract by delivering on the name day a ticket really issued by a member of the Stock Exchange, and that he is not responsible for any mistake or misconduct on the part of the issuer of that ticket unless he is applied to within the fifteen days; but it is right to point out that there is authority opposed to my view, and in support of that of Cleasby, B., in the court below, and Lush, J., in this court. In *Coles* v. *Bristowe* (1), the judgment indicates that it was the opinion of the Court that the novation was not with the member of the Stock Exchange who issued the ticket, but with the nominee whose name is given by him upon that ticket. And being struck by the obviously illusory character of a contract which would compel the seller of shares to accept the substituted liability of any one, the Court intimated an opinion that it must be a nominee to whom no reasonable objection could be made, and the language of the judgment of the Exchequer Chamber in *Grissell* v. *Bristowe* (1), though not quite so explicit, indicates a similar opinion.

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(1) Law Rep. 4 Ch. 3.

These opinions are entitled to great respect, and are weighty authorities; but being no necessary part of the judgment in those cases, they are not binding on us. And it is now necessary to inquire whether they were well founded. For the Court of Exchequer, in the first action of *Maxted* v. *Paine* (2), had a case in which the facts appear from the report to be that one North, a member of the Stock Exchange, issued a ticket containing the name of Maxwell as the person into whose name the shares were to be transferred, and passed it to Witton, who passed it to Paine, who passed it to the broker of the plaintiff. In fact, though it was not known to any of the intermediate parties who passed the ticket, North had mistaken the extent of his authority from Maxwell who was in consequence not bound by North's contract. It was much more than fifteen days after the contract before any application was made to Paine, and, according to the view I have taken of the custom, Paine ought to have been held no longer liable, the plaintiff's recourse being against North, the issuer of the ticket; but the Court of Exchequer, following the opinion indicated in *Coles* v. *Bristowe* (3), thought that the only novation was with the nominee, and that Maxwell not being bound, there was therefore no novation at all. If I were now sitting in a court of co-ordinate jurisdiction, I should be bound by this decision; sitting in a Court of Error I am bound to review it, if necessary; and I think it is necessary. For my Brother Cleasby in this case, in the court below, has followed up this a step further, and holds that the issuer of the ticket is bound to put on it an "ultimate pur-

36/ (1) Law Rep. 4 C. P. ~~112~~.

(2) Law Rep. 4 Ex. 81.

(3) Law Rep. 4 Ch. 3.

chaser," and that, therefore, the issuer of the ticket in the present case did wrong in issuing a ticket containing the name of such a person as Goss. And I quite agree that, so far as relates to the conduct of Sir S. Spry, this is correct, though seeing that it is found as a fact that Foster & Co., the actual issuers of the ticket, were wholly ignorant of the matters which made this wrong, I do not see that they were guilty of moral wrong.

But he proceeds to draw the conclusion that the usage required the defendant, Paine, not merely to pass a ticket really issued by a member of the Stock Exchange, and containing the name really supplied by that member, but a ticket containing a proper name supplied by that member, and that the members who, without either knowing or having the means of knowing the state of things, pass a ticket which has, in fact, not been properly framed, are all liable if the ticket was so issued as to be, as he strongly phrases it, "a document which is fabricated for the purposes of imposition." I should have great difficulty in answering this reasoning if I thought the first case of *Maxted* v. *Paine* (first action) (1) rightly decided.

And my Brother Lush, if I understand his judgment, holds that at least the issuer of the ticket ought to have put the name of his real principal, Sir S. Spry, upon the ticket, and that, not having done so, the intermediate parties, who without either knowing or having the means of knowing who the real principal of the issuers of the ticket was, passed a ticket not containing his name are responsible.

I will now proceed to state my reasons for dissenting from these opinions.

I have, in the earlier part of this judgment, given my reasons for thinking that it is no part of the contract of a purchaser of shares to give in either his own name or the name of his real principal as that into which he requires the shares to be transferred; that he does contract to accept a transfer into the name which he furnishes, whatever it may be, and to indemnify the vendor against all calls after the transfer is executed and delivered to him. And, also, that the vendor has no right to object to execute a transfer to any one named by the purchaser, and does not by executing the transfer release his purchaser from the obligation to indemnify him. This is contrary to what is assumed in *Coles* v. *Bristowe* (1) to be the law. I have, therefore, not come to this conclusion without much thought. Having come to it, I have given my reasons at length, and now I proceed on the supposition that the effect of the contract, when not qualified by custom, is as I have first stated.

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(1) Law Rep. 4 Ex. 81.

If I am right, the purchaser for the account can be under no obligation to furnish any particular name, nor can the seller for the account have any right to object to any name unless the custom is such as to cast the duty on the purchaser and give the right to the vendor. Nothing of the sort appears in the printed rules. The 13th paragraph of the case (2) is supposed to contain a statement that there is such a custom. I do not think it does. The committee of the Stock Exchange exercise a power over the members very analogous to that which the courts of law summarily exercise over the attorneys who are the officers of their courts. And it seems agreed on all hands that they would exercise this power where a member was guilty of fraud or want of good faith. And the paragraph shews that the members, when these questions arose, began to discuss among themselves whether the committee would or would not intervene if the holder of the ticket complained in due time that an improper name was on the ticket; and they have differed in opinion as to what the committee would do in such a case.

It does not appear that the committee ever have done or even been asked to do anything except in this particular case, in which they declined to interfere. Exercising therefore the power given me by the case, I draw the inference of fact that no custom to this effect is proved to exist.

But I go further, for I think there are many strong reasons for thinking that no such custom does or can exist. For, as it seems to me, it would render the carrying on of business on the Stock Exchange impracticable. If the effect of executing the transfer to the person whose name is given on the ticket was to substitute the liability of the nominee, not merely for that of those members who have passed that ticket, but also for that of

(1) Law Rep. 4 Ch. 3.

(2) Law Rep. 4 Ex. at p. 206.

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the member who has issued the ticket and himself placed the name upon it, it would seem but reasonable that the transferor should have a right to object to execute any transfer until he was affirmatively satisfied that the name to him unknown was that of a person whom he might safely trust to that extent.

No one of the intermediate parties who passed would have any means of satisfying him of this, and even the member who issued the ticket might often be in the same position.

It is, I believe, very common for London brokers to have orders sent them from the country through some country banker or local broker or other agent. Those they accept on the credit of the person giving them the order, without either knowing or caring who the ultimate principal is. This is illustrated by the facts in *Sheppard* v. *Murphy*. (1) There the London broker took the order from a Dublin broker, who again took it from a brother of the defendant, professing to have authority from the defendant. But the defendant denied that he had given his bro~~k~~er such authority, th and though the ultimate judgment was that the defendant had given the authority, it was not proved without much difficulty.

It is obvious that in such a case as that, no one of the members of the London Stock Exchange who were concerned in the transaction, could have supplied satisfactory evidence that Murphy was the real principal, though in fact he was.

There is no evidence whatever that the issuer or passer of the ticket is ever in practice required to furnish such evidence, and it seems that any custom which gave the transferor a right as part of his contract to require it, would in the case of a rising market give facilities to an unwilling vendor to avoid fulfilling his contract, and would therefore be so inconvenient that it would require strong evidence to make me believe that it existed.

But it is said that there is no right to require any one to prove affirmatively that the name proposed is a good one; that the burthen is upon the persons who take that ticket, that they are to make inquiries, and that unless they can prove affirmatively that there is some "reasonable objection" to accepting the liability of the person whose name is given in, they are bound to do so. I do not understand what is meant by a "reasonable objection." In *Coles* v.

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(1) 2 Ir. Rep. Eq. 544.

Bristowe (1), the persons whose names were given in all refused to pay the calls, which they had clearly contracted with some one to pay; and they did this for no apparent reason, but that they thought they could not be forced to do so. That was strong evidence that they were either insolvent and unable to pay, or dishonest repudiators of a just claim. Yet it was taken on an admission as a fact that no reasonable objection in fact existed to taking the substituted liability of persons, who it seems to me must have been in either one or other of those categories. The extreme vagueness of the supposed custom seems to me a strong ground for thinking that no such custom can in practice exist.

Passing by this, if the custom does exist, the broker must be bound to his customer to make the inquiries, and be liable to him for negligence if he does not. Now the general law would give the party, who was to get the transfer executed by the person in whose name the shares stand, a reasonable time for that purpose. And the rules of the Stock Exchange, as I have before pointed out, seem to me to fix that reasonable time at ten days. During those ten days, though they are not given for that purpose, the selling broker might make inquiries, but if he deals on a large scale, and has many contracts for the same account, it would, I think, be almost impracticable for him to make inquiries as to them all. This makes me think it highly improbable that the usage should be such as to cast upon the broker a duty which he could not practically perform. It appears from the report in *Coles* v. *Bristowe* (2), that in that case evidence was given that the brokers did not in practice inquire as to the solvency or responsibility of the transferees.

But whatever may be the force of these observations as regards the member who ultimately holds the ticket, it is much stronger in favour of those who pass it.

It is to be remembered that the obligation cast by the rules of the Stock Exchange on the member purchasing from another is not, as is inaccurately stated in the body of the case, simply to supply a name on the name day. It is between the hours of twelve and two on that name day to pass a ticket issued either by the member himself, or issued by some other member, and duly passed to him, and on that ticket appears the name furnished by the member who issued the ticket. On a busy account day the number of tickets passing through a member's hands must be very numerous; they must pass through many hands, and the whole transactions are to be completed within two hours. The ticket in practice must be passed on so rapidly that there can be scarcely time enough to make a memorandum of the fact that such a ticket has been passed to him by one member, and from him to another. It is obviously impossible that the passing member should stop the whole course of business by making inquiries as to who the person is whose name has been put upon that ticket.

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(1) Law Rep. 4 Ch. 3.

(2) Law Rep. 6 Eq. 152.

And I cannot think that a custom exists, which would compel the passing member to take and pass on a ticket issued by another member, and containing a name inserted on the ticket by that member, without inquiring or having the opportunity of inquiring under what circumstances that name was inserted, and yet make him liable, if at any future time it should appear that either owing to the mistake or misconduct of the issuing member a name was placed on that ticket, which ought not to have been so placed.

The whole machinery of the Stock Exchange is based on this, that the members deal with each other, and are liable to each other as principals.

It seems to me that the ultimate novation by the custom must be between the members, and that when it takes place it puts the member issuing the ticket under an obligation to fulfil exactly that duty which before that novation he would have had to fulfil to the member with whom he had originally contracted.

That novation, therefore, cannot take place till after all the differences in prices have been settled; for up to that time; the obligation on the holding member, who is not to part with his shares till paid the sum for which he has contracted to sell, is not precisely correlative with that of the issuing member, who is only bound to pay the sum for which he has contracted to buy, which may be smaller. That must be done within ten days; but the custom seems to me to give five days further, as of grace, during which the novation is suspended. It is not necessary for the decision of this case to determine whether the novation in this case was with Goss, the nominee, with whom the transfer was executed, or with Foster & Co., who issued the ticket, and with Sir S. Spry as their principal, though it is so essential a part of the reasoning on which my judgment is based, that I have thought it right to express my opinion that it is with the latter. But I think it is necessary to determine whether the custom of the Stock Exchange is such that a member of the Stock Exchange, no matter whether broker or jobber, who on the name day has passed a ticket duly issued by another member, and containing a name, has fulfilled his contract, and is, after the lapse of fifteen days, free from all further liability. I am of opinion that the custom is to this effect, and on that ground I affirm the judgment. I could not, in my view of the matter, come to that conclusion unless I thought the judgment in *Maxted* v. *Paine* (1st action) (1) was wrong; but I do not think that the affirmance of the judgment below, on the reasons given by the other members of the court, overrules *Maxted* v. *Paine* (1st action) (1), which must still remain an authority.

Cockburn, C.J. (2) Agreeing in the main in the judgment which has been delivered by my Brother Montague Smith, I, nevertheless, wish to base my judgment on the ground that, in my opinion, the decision in this case follows from, and must be governed by, the judgment of the Court of Exchequer Chamber in the case of *Grissell* v. *Bristowe* (3), and that it appears to me unnecessary to discuss the present case as though the judgment in the case referred to had never been pronounced, and the question as to the effect of the usage of the Stock Exchange were an open question, and to be dealt with now for the first time.

The present case differs from that of *Grissell* v. *Bristowe* (3) in one particular only, and the sole question is whether that one particular takes the case out of the principle of the former decision, by which, so far as it is applicable, we must, of course, necessarily be bound. In the present case, as in *Grissell* v. *Bristowe* (3), the action is brought by the seller of shares sold according to the custom of the Stock Exchange against the first buyer, on the ground that the ultimate buyer has failed to fulfil the terms of the

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(1) Law Rep. 4 Ex. 81.

(2) This judgment was read by Lush, J.

(3) Law Rep. 4 C. P. 36.

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contract by reason of his not paying calls subsequently made on the shares, in consequence whereof the plaintiff, as the registered owner of the shares, has been compelled to pay such calls.

The particular in which this case differs from *Grissell* v. *Bristowe* (1), is, that the party whose name was given by the defendant on the name day as the ultimate buyer by whom the shares were to be bought and paid for, and to whom they were to be transferred, was not the real buyer, but was a person who had been induced by the party on whose account the shares had in fact been bought, namely, Sir S. Spry, in consideration of a gratuity, to consent to take Sir Samuel Spry's place, and become the transferee of the shares; a transaction which, it should be observed, was wholly unknown to the defendant, who believed the party in question, one Goss, to be bonâ fide the purchaser of the shares.

In my opinion, this circumstance does not affect the result, and it seems to me that if the grounds on which the judgment of the Court of Exchequer Chamber in *Grissell* v. *Bristowe* (1), are duly considered, it necessarily follows that our judgment must be in favour of the defendant. My reason for so thinking is that it appears to me that the effect of the whole transaction, as between Sir Samuel Spry and Goss, in the first instance, and between Goss and the plaintiff, in the second, was to constitute Goss, as between him, the plaintiff and the company, in effect the purchaser of the shares. If any circumstances had afterwards arisen whereby the company had been restored to a prosperous condition, and which had led to the discharge of the order for winding up, and the shares, instead of being at a discount, had again become valuable, Goss, and Goss alone, could have insisted on being registered as the owner, and would alone have been entitled to receive any dividend payable on them.

It is unnecessary, as it seems to me, to consider how far in such an event Goss might have been held to be a trustee for Spry, or might have been compellable to transfer the shares to the latter, if indeed the fraudulent nature of the purpose out of which the transaction between himself and Spry originated would not have been fatal to any such claim on the part of the latter. It is enough to say that, as between himself and the plaintiff, Goss

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(1) Law Rep. 4 C. P. 36.

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became the purchaser, and became bound to the performance of the contract. There can be no doubt, I apprehend, that Goss became liable to the plaintiff to pay future calls on the shares, or that if, instead of being a man of straw, he had been or had afterwards become a man of substance, against whom it would be worth while to bring an action, an action would lie against him to reimburse the plaintiff. In the judgment in *Grissell* v. *Bristowe* (1) the Court say, "when the seller adopted the substituted parties as the buyers, and the price was paid by the one, and the property transferred by the other, a contract, and the relation of vendor and vendees, immediately arose between them." I am, therefore, of opinion that Goss must, for the present purpose, be treated as the purchaser of the shares. It is clear that he was so treated by the plaintiff, who executed the transfer of the shares to him without hesitation or objection. If this be so, the case is brought directly within the decision in *Grissell* v. *Bristowe.* (2) In that case the Court held that, while according to the reasonable construction of the usage of the Stock Exchange, the first buyer in availing himself of the right afforded by the usage, and therefore implied by and comprehended within the terms of the original contract, of substituting another buyer for himself, was bound to give the name of a person willing and able to fulfil the contract, yet if the seller, instead of objecting to the person so proposed, accepted such person as the buyer, and proceeded to transfer the shares to him, he took him for better or worse, and in so doing released the original buyer from all further liability; in other words, that there was no implied warranty of the sufficiency of the substituted buyer, or of the performance of the contract in its ulterior details by him, but simply an obligation, if he availed himself of his right of substituting a buyer, to provide one to whom the seller could not reasonably object; while, on the other hand, the right of the seller to object would be waived if, instead of availing himself of the opportunity of inquiring and of his right to object, he at once accepts the party proposed as buyer, and proceeds to transfer the shares to him.

7 Ch 759.

In the judgment of the Court in *Grissell* v. *Bristowe* (3) the

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(1) Law Rep. 4 C. P. at p. 51.

(2) Law Rep. 4 C. P. 36

(3) Law Rep. 4 C. P. at p. 50.

Court say, with reference to the effect of the seller having without objection transferred the shares of the nominee of the first buyer, "in so doing it is obvious that the plaintiff has for ever deprived himself of the power of transferring the shares to the defendants, yet it was in consideration of having the property in the shares, which must always be assumed to have some value, conveyed to them in the event of their nominees not fulfilling their obligations as buyers, that the defendants assented to be bound to the obligations of the contract. When, therefore, the plaintiff has by his own act put it out of his power to give to the defendants the consideration which formed the basis of the contract, and has transferred that benefit to another, it would obviously be unreasonable and unjust that he should be at liberty to enforce the obligations, the consideration for which entirely fails."

It is unnecessary to consider what may be involved in the right of the seller to insist on the substituted buyer being competent to fulfil all the obligations of the contract, and how far he may be entitled to ask for information from the original buyer, or insist on time to enable him to make the necessary inquiries. We are here dealing with a case in which the seller has accepted the proposed buyer, and has transferred the shares to him; and the principle of the decision in *Grissell* v. *Bristowe* (1) appears to me therefore clearly to apply. I therefore concur with the majority of the Court in holding that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Freshfields.*
Attorneys for defendant: *J. & M. Pontifex.*

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(1) Law Rep. 4 C. P. 36.

END OF HILARY TERM, 1871.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXIV VICTORIA.

SANKEY BROOK COAL COMPANY, LIMITED, *v.* MARSH AND ANOTHER.

1871
April 26.

Company—Winding-up under Supervision—Set-off—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 87, 101, 130, 131.

Where a limited company, being insolvent, passes a resolution to wind up voluntarily, and an order is afterwards made to continue the winding-up under the supervision of the Court, in an action afterwards brought by the liquidator in the name of the company against a member, a debt due from the company to the defendant previous to the resolution cannot be set off against a debt incurred by the defendant to the company after the resolution.

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9QBD6
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10QBD2

DECLARATION, that before the contracting by the defendants of the debt thereinafter mentioned a resolution was duly made by the plaintiffs' company, in which the defendants were then shareholders, to wind up the company voluntarily; that a liquidator was duly appointed; that afterwards a petition was presented to the Court of Chancery and an order made thereupon that the said voluntary winding-up should continue subject to the supervision of the Court, which order still remains in full force and effect, of all which premises the defendants had notice; that after the aforesaid resolution

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and appointment, and while they were in full force and effect, and while the company was being wound up in pursuance of the resolution as aforesaid, and while the defendants continued shareholders, the defendants became indebted to the plaintiffs for money payable for goods bargained and sold, goods sold and delivered, work, labour and materials, money paid, interest, and on accounts stated.

Plea: Set-off of money which, by an indenture made between the plaintiffs and the defendants before the making of the said resolution, the plaintiffs covenanted with the defendants to pay to the defendants at a time which elapsed before the making of the resolution, and of money lent by the defendants to the plaintiffs before the making of the resolution, and of money received by the plaintiffs for the use of the defendants before the resolution.

Demurrer and joinder.

Quain, Q.C. (*FitzAdam* with him), in support of the demurrer. The defendants, being shareholders when the winding-up commenced, are shareholders still; for after the commencement of the winding-up the status of members cannot be changed: s. 131 of the Companies Act, 1862. They are therefore contributories, and, the winding-up being continued under the supervision of the Court, they are within s. 101, the principle of which has been considered applicable to actions at common law: *Brighton Arcade Company* v. *Dowling.* (1) In that case s. 101 was held not to apply to the case of a voluntary winding-up; but the Court expressly say that their decision would be otherwise in the case of a winding-up under supervision. And on general principles this ought to be so. A voluntary winding-up commences from the date of the resolution to wind up (s. 130); thereupon the company ceases to carry on business, except for the purpose of winding up, but its corporate state and powers continue until the affairs of the company are wound up (s. 131); and these powers are exercised by the liquidators (s. 133), but solely for the purpose of winding up the company. It was during the continuance of this state of things that the debt sued for was contracted. But further, an order has here been made upon a petition under s. 147, to continue the winding-up

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(1) Law Rep. 3 C. P. 175.

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subject to the supervision of the Court; and that petition has, with respect to the jurisdiction of the Court over suits and actions, the same effect as a petition for winding up (s. 148). The effect of the whole proceeding is, that the winding-up is in substance a winding-up for the benefit of all the creditors, who have the first charge on the assets collected; and the claim of set-off now made is an attempt by the defendants to obtain payment of 20*s.* in the pound upon their debt, contrary (they being shareholders) to s. 101, and to the provisions of ss. 131 & 153, that after the commencement of the winding-up (that is, the resolution (1)) no alteration can be made in the status of the members. It is also contrary to ss. 87 & 163, which provide that after the winding-up no proceeding shall be commenced or proceeded with against the company without the leave of the Court. The reasoning in *Grissell's Case* (2), *Wiltshire Iron Co.* v. *Great Western Ry. Co.* (3), and *Brighton Arcade Co.* v. *Dowling* (4), is entirely in favour of the plaintiffs.

Milward, Q.C. (*R. V. Williams* with him), in support of the plea. The case is within the statute of set-off, and is also within the case of *Brighton Arcade Co.* v. *Dowling.* (4) The fallacy is in supposing that a winding-up under supervision is necessarily different in its circumstances from a voluntary winding-up. It may still remain nothing but a dissolution of a solvent company, for their own benefit, and without any reference to their creditors (s. 129); for a petition under s. 147 may be presented by a member. (5)

[On the suggestion of the Court, *Quain* assented to the insertion in the declaration of an allegation that the company was insolvent.]

Quain was not called on to reply.

MARTIN, B. I am of opinion that this set-off cannot be established. If any provision of the legislature compelled us to allow it, we must do so, although the result would be grossly unjust; but, in my judgment, these debts are not in substance and in fact mutual debts within the meaning of the statute of set-off. The

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(1) Weston's Case, Law Rep. 4 Ch. 20.

(2) Law Rep. 1 Ch. 528.

(3) Law Rep. 6 Q. B. 101.

(4) Law Rep. 3 C. P. 175.

(5) See *In re Beaujolais Wine Co.*, Law Rep. 3 Ch. 15; *In re London and Mercantile Discount Co.*, Law Rep. 1 Eq. 277.

(2) Sc 12 Jur N.S. 718

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debt owing by the company was contracted and became due whilst they were in a state of solvency and independency; the debt to them became due after the commencement of a winding-up under the supervision of the Court of Chancery, and arose from the sale of property of the plaintiffs made subsequently to the liquidator taking the affairs of the company under his control. These are, in substance and good sense, not debts between the same parties.

It is argued that *Brighton Arcade Co.* v. *Dowling* (1) is in favour of the defendants' claim; but at the very commencement of his judgment in that case, Bovill, C.J., distinctly says that he confines his judgment to the case of a voluntary winding-up, and that it would be otherwise in the case of a winding-up under the supervision of the Court. The other learned judges say the same, and I have no doubt that that view is correct.

BRAMWELL, B. I am of the same opinion. We might decide the case on the authority of *Brighton Arcade Co.* v. *Dowling* (1); for although the observations upon this point which are made in that case are, in one sense, extrajudicial, yet they are the deliberate expression of opinion of four learned judges, who justified their decision by shewing that the point before them was different from that now before us, and who were therefore compelled to consider this very question in order to arrive at their conclusion. But, independently of that authority, if we look at the substance of the matter, it cannot be that the defendants ought to succeed. Subsequently to the plaintiffs' insolvency the liquidator carried on their business, possibly altogether, but at any rate primarily, for the benefit of their creditors, who had the first claim on whatever might be realized. In the course of carrying on that business goods are sold to the defendants, who claim to set off against the price a debt due to them from the company before the winding-up. The case is precisely as if a person against whom assignees in bankruptcy brought an action for a debt incurred to them, should attempt to set off a debt due to him from the bankrupt. If, therefore, the good sense of the matter is looked at the case is plain, and the only thing that could be said in favour of the defendants would be, that there is nothing in a winding-up to impair the effect of the statute of set-off; that the debts are here mutual, the one being due from the plaintiffs to the defendants, and the other due from the defendants to the plaintiffs; and that at common law it matters not what are the equitable rights of the parties—a defendant, for instance, being entitled to his set-off notwithstanding that the plaintiff has assigned over his debt. But I think that these debts are in substance not mutual, but that the real plaintiff is the liquidator, and that the debt sued for is really due to the body of creditors in whose behalf he brings the action. I think we are entitled to look at the substance of the matter, and that we should be most unjustifiably cleaving to the letter if we allowed this set-off to prevail.

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(1) Law Rep. 3 C. P. 175.

But further, it is a well-known and familiar rule of law, that no plea of set-off is good if it is founded on a claim that could not be made the subject of an action. Now, could the defendants maintain an action against the plaintiffs for their claim? I say they certainly could not; for by the 87th section of the Companies Act, 1862, "no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." Whether, if such an action were brought, this provision would be taken advantage of by plea in bar or in abatement, or by stay of proceedings, is immaterial; here it appears on the record that no such action could have been maintained. In *Higgs* v. *Northern Assam Tea Co.* (1) a replication, shewing that under the circumstances the set-off pleaded by the company was inequitable, was held good; and that case has since been approved by the Master of the Rolls in *Ex parte Universal Life Assurance Co.* (2) This shews that in an action against the company a replication shewing that the real plaintiff was the liquidator, and that he sued for the benefit of the general body of creditors, would be good; for equity would in that case restrain the defendants from setting up this defence. On this ground, in addition to those before mentioned, I am of opinion that these are not mutual debts, and that the plea of set-off is bad.

(1) Law Rep. 4 Ex. 387.

(2) Law Rep. 10 Eq. 458.

Our decision is entirely in accordance with the principles acted upon in *Wiltshire Iron Co.* v. *Great Western Railway.* (1)

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Sharpe, Parker, & Co.*
Attorneys for defendants: *Gregory & Co.*

May 8.

PICKWELL *v.* SPENCER AND OTHERS.

Will before 1838—*Fee given without Words of Limitation.*

By a will dated before 1838, the testator gave lands to his wife without words of limitation. He also made her executrix and general legatee; and directed that "my executrix shall pay my eldest son W. P. the sum of 5*l.* a year for wages as long as he shall continue to labour on the farm after my decease":—

Held, that the wife took the fee.

Affd in Ex Ch LR 7 Ex 105

SPECIAL CASE stated in an action of ejectment, brought by John Pickwell, the customary heir of Matthew Pickwell.

The land in question, which was copyhold, was devised by Matthew Pickwell, by a will dated 26th of March, 1821, in the following words:—"I give and bequeath to my beloved wife, Mary Pickwell, all those my copyhold closes, which I have surrendered to the use of my will, situate, &c. I also give and bequeath to my said wife Mary Pickwell all the land which may fall to the said closes by the inclosure of the High Moor. Also, I give and bequeath to my said wife, Mary Pickwell, all my money, securities for money, goods, chattels, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my decease. And I do nominate, &c., my said wife executrix of this my last will." The testator then directed that "if my said wife Mary Pickwell marry again," an inventory should be taken of all the land, goods, &c., before-mentioned by certain persons, whom he appointed guardians of his children, with power to take away the goods, chattels, and effects, and "to reserve" them and the lands for the benefit of his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds "equally amongst my surviving children. It is also my will that my executrix shall pay my eldest son William Pickwell the sum of 5*l.* a year for wages, as long as he shall continue to labour on the farm after my decease."

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(1) Law Rep. 6 Q. B. 101.

The testator died shortly after making his will. In 1832, Mary Pickwell sold the lands in question to Richard Snow, who died in 1857, having devised them to trustees for his wife during her life, and after her death to the defendants as tenants in common.

Richard Snow's widow died, and the defendants were admitted in 1865.

Mary Pickwell died in 1870.

The question for the opinion of the Court was, whether Mary Pickwell took any larger estate in the land than a life estate.

April 27. The case was argued by

Field, Q.C. (*J. J. Aston* with him), for the plaintiff, and

Manisty, Q.C. (*F. M. White* with him), for the defendants.

They cited *Roe* d. *Bowes* v. *Blackett* (1), and *Doe* d. *Willey* v. *Holmes.* (2)

Cur. adv. vult.

May 8. The judgment of the Court (MARTIN, BRAMWELL, and CLEASBY, BB.) was delivered by

CLEASBY, B. The question in this case is, whether the devise to Mary Pickwell without words of limitation (which, standing by itself, would only give an estate for life), is enlarged to a devise in fee by reason of what follows in the will.

It has been established from a very early period, that where a devisee whose estate is undefined, is directed to pay either a sum in gross, or an annual sum, he takes an estate in fee. This is a rule adopted to escape from the technical necessity of words of limitation, and the reason given is, that if the devisee had only an estate for life, he might possibly be damnified; and the amount of the charge and the probability of loss are not taken into consideration.

In *Wellock* v. *Hamond* (3), the devise was to the wife of the

(1) Cowp. 235. (2) 8 T. R. 1. (3) Cro. Eliz. 204.

testator for life, remainder to his eldest son, he paying 40*s.* to each of his brothers and sisters within two years after the death of the wife. It was adjudged a fee in the eldest son, and at that early time the rule was considered as established. The judgment of the Court is: "It is a fee, for the value is not material, and no book speaks of the value."

In *Lee* v. *Stephens* (1), the devise was to A. conditionally that he should allow to his son Nicholas, meat, drink, &c., during his natural life. A. was held to take a fee.

It has also been considered that it makes no difference that the payment has to be made upon a contingent event—as, for instance, upon a certain person attaining twenty-one: *Doe* d. *Thorn* v. *Phillips* (2); *Abrams* v. *Winshup* (3).

In the present case the direction is, that the executrix shall pay to the eldest son 5*l.* a year for wages so long as he works upon the farm devised to her. We consider the word *executrix* here does not mean *as* executrix, but is a designatio personæ, the payment being connected with the farm devised to her. The payment, therefore, is for an uncertain period, over which the devisee has no control, and although it is said to be for wages, it is still compulsory. The reason usually given in these cases applies, viz., that the devisee might die in a week after the testator; yet still the will directs that she shall pay the sum mentioned so long as the son works upon the farm—that is, after she has ceased to have any interest in it, if she only takes an estate for life. The conclusion at which we arrive is, that the devisee, Mary Pickwell, took an estate in fee, defeasible of course (either at law or in equity), upon her marrying again.

It was also contended that the devise or limitation over in case the widow married again, had the same effect as a limitation over in case the devisee died under twenty-one, the latter limitation having undoubtedly the effect of enlarging a devise without words of limitation to an estate in fee. There is no clear authority bearing upon such a limitation as the present, and we think it better to express no opinion upon it, as it is not necessary for the decision of the case; and the other conclusion in favour of the

(1) 2 Show. 49. (2) 3 B. & Ad. 753.
(3) 3 Russ. 350.

defendants rests upon the established rule and the authorities to which we have referred.

Judgment for the defendants.

Attorneys for plaintiff: *Swann & Co.*
Attorneys for defendants: *Borrett, White, & Borrett.*

ATTORNEY-GENERAL *v.* GILPIN AND OTHERS.

May 8.

Stamps—Exemption from Duty—Benefit Building Society—Drafts by Members on Society—10 *Geo.* 4, *c.* 56, *s.* 37—6 *&* 7 *Wm.* 4, *c.* 32, *s.* 4.

By the rules of a benefit building society, its members were holders either of completed shares of 30*l.*, or of uncompleted shares of 30*l.*, to be paid up by monthly instalments. A notice of twenty-eight days was to be given by any member wishing to withdraw his shares, who was, at the same time, to leave his pass-book at the office; and if at any time the money in hand was not sufficient to pay all the members wishing to withdraw, they were to be paid in rotation according to the priority of their notices. By the practice of the society, members holding completed shares were allowed to withdraw only whole shares, but members holding uncompleted shares were allowed to withdraw the whole or any part of the money standing to the account of the shares. Interest was paid half-yearly on completed shares, but not on uncompleted shares. The mode of withdrawing shares, whether completed or uncompleted, was by the member giving notice of withdrawal, upon which he was furnished with a form of request for a draft, on the receipt of which request, signed by him, a draft for the amount was forwarded to him, made payable *to bearer.* The drafts were usually paid within a week of the notice to withdraw. Drafts payable *to bearer* were forwarded half-yearly to the holders of completed shares, in respect of the interest due on the shares, without any previous request:—

Held, that such drafts were liable to stamp duty, not being within the protection of 6 & 7 Wm. 4, c. 32, s. 4, and 10 Geo. 4, c. 56, s. 37.

CASE stated under 22 & 23 Vict. c. 21, in a proceeding against the trustees of the National Permanent Mutual Benefit Building Society, to recover penalties for paying unstamped drafts.

The society was registered under 6 & 7 Wm. 4, c. 32. By the society's rules the shares were 30*l.* each (rule 1); they were to be completed by monthly instalments (rule 3); but might, under certain conditions, be advanced by the executive committee, out of money in hand, to members not in arrear (rule 7). Interest was to be allowed on subscriptions in advance, and on completed shares

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(rule 5); at the end of the year, such a portion of the profits as the committee might direct was to be placed to the credit of the holders of unadvanced shares, but not paid till the shares were withdrawn or realized (1); and when any share was advanced, or completed, or withdrawn, before the end of the year, interest was to be allowed at such rate as should be determined by the committee (rule 17).

Any member might withdraw his shares twenty-eight days after having given notice of his intention to do so, and left his pass-book at the office; but if the money in hand were insufficient to pay all the members wishing to withdraw, they were to be paid in rotation according to the priority of their notices; and every member withdrawing was to give up his pass-book (rule 13).

Payment to any one producing a member's pass-book, and representing himself to be that member, was to discharge the society and its officers, unless notice of the loss of the pass-book had been given (rule 14).

The only rule relating to cheques was the 24th, which provided that "no payments shall be made out of the funds of the society except by order of the executive committee; and all cheques upon the bankers shall be signed by one trustee and two other members of the executive committee, and countersigned by the secretary."

Members are supplied with two forms of pass-book, one for completed and the other for uncompleted shares, but not with cheque-books. There is no restriction other than the 13th rule to prevent the holder of an uncompleted share from drawing out the whole or any portion of the moneys standing to the credit of such share; but a member is not allowed to withdraw part of a completed share.

The practice with respect to drawing out the whole or any part of the money standing to the credit of a member in the books (except interest on completed shares, for which forms of draft are sent half-yearly, as the interest becomes due, without any previous request) is as follows:—The member gives the society a notice of the sum intended to be drawn out; the society's accountant then forwards him a request for a form of draft for the sum named, which the member signs and returns, together with his pass-book; the accountant thereupon forwards a draft in the form given below, filled up in all respects except the signature of the drawer.

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(1) See 6 & 7 Wm. 4, c. 32, s. 1.

It is not the practice of the society to avail itself of the twenty-eight days mentioned in rule 13, and the draft is, in general, drawn and cashed within a week of the notice of withdrawal.

The society, though having (by rule 18) a power of borrowing, has never exercised it. It receives no other deposits than the payments of members upon shares, and it has no other funds than the aggregate of the members' shares, and the balance of unappropriated profits. There is no limit to the number of shares in the society, or to the number, whether completed or uncompleted, which any member may hold. Any person can take a share on payment of a fee of 1*s.* per share; the monthly instalments are not enforced, and the whole amount of a share or any number of shares may be paid at once, or from time to time, at the pleasure of the holder.

The only office of the society is in London, but its members are resident in various parts of the country. It does not purchase land or houses for its members, or assist its members in obtaining houses or land otherwise than by advancing money on mortgage, and such advances are made to other persons as well as to members. The average amount of moneys standing to the credit of members in respect of completed shares in 1868–69 was 518,265*l.*, and in respect of uncompleted shares, 581,111*l.*; and the number of drafts drawn during the year was 19,865, exclusive of drafts by which the whole amount standing to any member's credit was drawn out on his share becoming a completed share.

Of the drafts in question, one was drawn by Stephen Ranger, a member, in respect of an uncompleted share, and was in the following form:—

"80,338 National Freehold Land Society
Led. 151. (Registered as the National Permanent
Fo. 462. Mutual Benefit Building Society, pursuant to 6 & 7 Wm. 4, c. 32).

10*l.* 18*s.* 2*d.* 1 Feb., 1870.

"On demand, pay to bearer ten pounds 18/2, payable to me pursuant to notice of withdrawal.

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To
"The Trustees of the National
Permanent Mutual Benefit Building Society, 14, Moorgate Street,
London.
Office hours, &c."

Signature,
STEPHEN RANGER.

The draft was crossed as follows:—

"Pay Smith, Payne, & Co.,
Randall & Co., Maidstone."

This draft, after being signed by Ranger, was paid away by him, and on the 5th of February was paid to the holder, without having been stamped.

The second draft was drawn by Ruth Ann Tanner, a member, in respect of interest on a completed share, and was similar in form to the other. The body of the draft was in the words:—

"On demand pay to bearer twelve shillings and one penny, for interest on my completed share account, due to me this day."

This draft was not crossed. It was dated the 31st of October, 1869, and, after being signed by R. A. Tanner, was paid to the holder on the 1st of November, without having been stamped.

The question for the Court was whether both or either of the drafts were liable to stamp duty.

April 25. *Sir R. P. Collier, A.G.* (*C. Hutton* with him), for the Crown. These drafts are in reality cheques, and are within 21 & 22 Vict. c. 20, s. 1, which takes away the exemption in favour of cheques drawn payable within a certain distance, contained in the previous Acts of 55 Geo. 4, c. 184, 16 & 17 Vict. c. 59, and 17 & 18 Vict. c. 83; those who pay them are therefore liable to a penalty, either under 55 Geo. 3, c. 184, s. 11, or under 17 & 18 Vict. c. 83, s. 7. But exemption is claimed under 6 & 7 Wm. 4, c. 32, s. 4, which extends to benefit building societies the provisions of the then existing Friendly Societies Act (10 Geo. 4, c. 56) (1), "so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof." But, in the first place, this is, either not at all, or not exclusively, a benefit building society; it is a banking society, and it is in this character that the transactions in question take place. Secondly, these cheques are not within the terms of 10 Geo. 4, c. 56, s. 37 (1); they are not drafts or orders "required or authorized to be given in pursuance of" the Act; they are not even required or authorized to be given in pursuance of "the rules of the society," although, even if they were, it could not be admitted that 18 & 19 Vict. c. 63, s. 37 (which adds these words), applies to this society. The object of the Act (which must here mean the Act of 6 & 7 Wm. 4, c. 32) was to assist the members of the societies in acquiring land for the erection of dwelling-houses; but the purpose of these drafts is to carry on the business of banker and customer. Neither do the rules of the society contemplate any such a mode of carrying on business, but evidently intend payment to be made only upon the pass-book (see rule 13).

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(1) Since repealed by 19 & 20 Vict. c. 63.

Quain, Q.C. (*Thrupp* with him), for the defendants. If the drafts are negotiable instruments, it is true that, unless they are protected by 6 & 7 Wm. 4, c. 32, s. 4, and 10 Geo. 4, c. 56, s. 37, they are liable to stamp duty; but they are distinctly within the terms of those sections. The society is carrying on its own legitimate business, and drafts in this form are essential to the convenient transaction of it. Both the Act and the rules contemplate the payment out to members, both of whole shares and of parts of uncompleted shares, and of interest on whole shares; the only limitation placed on the dealing with uncompleted shares being, that periodi-

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(1) By 10 Geo. 4, c. 56, s. 37: "No copy of rules, power, warrant, or letter of attorney, granted or to be granted by any person as trustee of any society established under this Act, for the transfer of any share in the public funds standing in the name of such trustee, nor any receipts given for any dividend in any public stock or fund or interest of Exchequer bills, nor any receipt, nor any entry in any book of receipts, for money deposited in the funds of any such society, nor for any money received by any member, his or her executors or administrators, assigns, or attorneys, from the funds of such society, nor any bond nor other security to be given to or on account of any such society, or by the treasurer or trustee or any officer thereof, *nor any draft or order*, nor any form of assurance, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever *required or authorized to be given, issued, signed, made, or produced in pursuance of this Act*, shall be subject or liable to be charged with any stamp duty or duties whatsoever."

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cal interest or profit shall not be paid upon them (6 & 7 Wm. 4, c. 32, s. 1, and rule 17). It is essential that the mode actually adopted, or some equivalent mode, should be used, for it would be practically impossible otherwise to make remittances to members at a distance of the sums to which they were entitled. If so, these are certainly drafts or orders authorized or required by the Act, and they are so in a greater degree than the instruments which were held exempt in *Walker* v. *Giles* (1), *Barnard* v. *Pilsworth* (2), and *Thorn* v. *Croft* (3); and 31 & 32 Vict. c. 124, s. 11, amounts to a legislative declaration that these are correct decisions. They are, in fact, directly within the words used by this Court in delivering judgment in *In re Royal Liver Friendly Society* (4); they are documents "relating to the conduct of the internal business;" they are "required in the administration of the society's affairs." That the number of members is large, and therefore the funds of the society large also, only shews that the purpose and policy of the Act have proved successful. But, secondly, these drafts are not negotiable instruments; they are payable only out of a particular fund, and in the event of there not being money in hand, the holder must wait for his turn.

C. Hutton, in reply.

Cur. adv. vult.

May 8. The judgment of the Court (Kelly, C.B., Channell and Pigott, BB.) was delivered by

KELLY, C.B. The question is, whether the instruments before us, which are, in form, ordinary cheques, require a stamp. They certainly do, unless the circumstances under which they are drawn exempt them from duty under some express legislative enactment. It is contended that they do obtain that exemption by reason of 6 & 7 Wm. 4, c. 32, s. 4, which extends to benefit building societies the provisions contained in 10 Geo. 4, c. 56, with reference to friendly societies. The section of the latter Act which is relied upon is s. 37, which contains among the list of exempted instruments, "draft or order;" it is necessary, therefore, to inquire what sort of drafts and orders are contemplated by the section. They must be drafts or orders "required or authorized to be given, issued, signed, made, or produced, in pursuance of" the Act; and I think these words limit the drafts and orders mentioned to such as are drawn by an officer of the society for its purposes, or by a member upon the society, payable to himself only. The rules of the society evidently contemplate a payment to the member personally, on the production of his pass-book, and after its examination, and not a payment made on the draft of a member at a distance, and perhaps abroad, payable to the bearer, and passing from hand to hand with or without indorsement. Indeed, looking at the facts stated in the case, it may be doubted whether this is really a benefit building society at all; at all events, this is not a transaction falling within the ordinary transactions of a building society, but is a transaction between banker and customer. The society has possessed itself of deposits amounting to more than one million pounds, which remain in its hands in the ordinary mode of banking business. A notice is required of a member's intention to withdraw his deposit, but on the expiration of the limited time, the member is entitled to withdraw either his completed share or shares of 30*l.*, or the whole or any part of his uncompleted shares. This is clearly a banking transaction, and not a transaction within the operations either of a benefit building society or a friendly society, or within the spirit and meaning of 10 Geo. 4, c. 56, or 6 & 7 Wm. 4, c. 32. The result is, that these drafts are liable to stamp duty, and the Crown is, therefore, entitled to the judgment of the Court.

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(1) 6 C. B. 662, 696; 18 L. J. (C.P.) 323, 329.

(2) 6 C. B. 698, n.; 18 L. J. (C.P. 330, n.

(3) Law Rep. 3 Eq. 193.

(4) Law Rep. 5 Ex. 78.

Judgment for the Crown.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for defendants: *Russell, Davies, & Russell.*

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April 29.

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FORSHAW *v.* DE WETTE.

Costs—County Court Act, 1867, *s.* 5—*Reference by Consent—Discretion of Arbitrator.*

In an action of trover and of debt a verdict was taken for the plaintiff for the damages claimed, subject to a reference, "the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator." The arbitrator awarded that the verdict should be entered for 2*l.* 10*s.* as to the claim in trover, and for 7*l.* 12*s.* 8*d.* as to the claim in debt, and directed the defendant to pay the costs of the reference and award. He had the power of certifying for costs, but gave no certificate. The taxing-officer declined to tax the plaintiff either his costs of the cause, or of the reference and award. On a rule directing him to tax both the costs of the cause and of the reference and award:—

Held, that the plaintiff was not entitled to the costs of the cause, but that he was entitled to those of the reference and award, although he had recovered in the cause sums not exceeding 10*l.* in tort, and 20*l.* in contract.

THIS was an action in the Common Pleas of Lancaster, in which, at the Liverpool Summer Assizes, 1870, a verdict was entered for the plaintiff for the damages claimed, subject to a reference, "the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator." The declaration contained a count in trover, and a count in debt, and the arbitrator awarded that the verdict should stand and the damages be reduced to 2*l.* 10*s.* on the count in trover, and to 7*l.* 12*s.* 8*d.* on the count in debt. He had the same power of certifying for costs as a judge at nisi prius, but gave no certificate as to the cause. The costs of the reference and award he directed should be borne by the defendant. The prothonotary having been applied to by the plaintiff to tax him both the costs of the cause and of the reference and award, declined to tax either. The plaintiff appealed from this decision, and his appeal was heard at chambers before Byles, J., who made no order, without prejudice to any application which might be made to the Court.

Jan. 27. *R. G. Williams* moved for a rule calling on the defendant to shew cause why the prothonotary should not tax the plaintiff his costs of the cause and of the reference and award.

First, as to the cause; no certificate for costs is required, for where the total sum recovered in the action exceeds 10*l.*, as it does here, and one of the causes of action is in tort, the County Court Act, 1867, s. 5, does not apply. (1) The plaintiff ought not to be deprived of his costs of the cause because the arbitrator has applied specifically a sum under 10*l.* to the count in trover. Secondly, as to the costs of the reference and award, the arbitrator had power to award them under the express terms of the order of reference.

THE COURT (Kelly, C.B., Martin, Channell, and Pigott, BB.), refused the rule on the first point, being clearly of opinion that the plaintiff was deprived of his costs under the County Court Act, 1867, s. 5, having only recovered 2*l.* 10*s.* in respect of the tort sued for. On the second point they granted a rule nisi.

April 29. *Nasmith* shewed cause. The arbitrator exceeded his authority in awarding that the defendant should pay the costs of the reference and award. The reference was of the cause only, and less than the amounts specified in the County Court Act, 1867, s. 5, having been awarded on the counts for tort and debt respectively, the arbitrator had no power to direct the defendant to pay the costs. In *Moore* v. *Watson* (2), on a compulsory reference of an action of contract to a master, the costs of the cause to abide the event, and those of the reference and award to be in the master's discretion, he awarded less than 20*l.*, and directed the defendant to pay the costs of the reference; but the Court held the plaintiff was deprived of those costs. The same rule applies here, although the reference was by consent: *Cowell* v. *Amman Colliery Co.* (3)

R. G. Williams, in support of the rule, was not called on.

KELLY, C.B. I think this rule should be made absolute. The

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(1) The County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5, enacts that "if, in any action in any of the superior courts the plaintiff shall recover a sum not exceeding 20*l.*, if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs."

(2) Law Rep. 2 C. P. 314.

(3) 6 B. & S. 333; 34 L. J. (Q.B.) 161. 11 Jur. N.S. 687

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arbitrator had a discretionary power over the costs of the reference and award, and he has directed the defendant to pay them. The taxing-officer has declined to tax them, and this application is made for the purpose of compelling him to do so, and of thus enabling the plaintiff to get the costs awarded to him. It is contended, however, that a less sum having been recovered in the cause than would entitle the plaintiff to costs under the County Court Act, 1867, s. 5, the arbitrator exceeded his authority, and that he had no power to direct the costs of the reference and award to be paid by the defendant, and two cases have been cited in support of that contention. They are both, in my opinion, clearly distinguishable. The first was *Cowell* v. *Amman Colliery Co.* (1), and there it was held that the costs of the cause were not recoverable, less than 20*l.* having been recovered in an action of contract. No question was raised there as to the costs of the reference and award, whilst here the only question is as to those costs. All that the case decided was that, as far as the cause was concerned, no award could do away with or get rid of the provisions of the County Court Act then in force. As to the second case—that of *Moore* v. *Watson* (2)—that was a compulsory reference of a cause under the Common Law Procedure Act, 1854; and the Court held, that though the order of reference gave the arbitrator a discretionary power over the costs of the reference and award, and though he exercised it in favour of the plaintiff, the plaintiff was, nevertheless, not entitled to costs, having recovered less than 20*l.* But the reason of that decision is obvious. In a compulsory reference of a cause, the costs of the reference and award are part and parcel of the costs of the cause, and the event of the cause, if a less amount is recovered than the County Court Acts contemplate, must disentitle the plaintiff to the whole costs. But in the case before us the reference was by consent, and the costs of the reference and award are provided for by the express agreement of the parties, and they can, therefore, be severed from the costs of the cause. The arbitrator, having this power given him over the costs of the reference and award, has directed the defendant to pay them; and I think he had power to do so, and that his award ought to be carried into effect.

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(1) 6 B. & S. 333; 34 L. J. (Q.B.) 161.

(2) Law Rep. 2 C. P. 314.

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CHANNELL, B. I am entirely of the same opinion. The two cases cited are distinguishable on the grounds stated by the Lord Chief Baron.

PIGOTT, B. I also think the rule should be made absolute, though the observations of Willes, J., in *Moore* v. *Watson* (1), have caused me to feel some doubt on the matter. Still I see nothing in the language of the County Court Act, 1867, s. 5, to deprive the plaintiff of the costs here awarded to him. The words of the section are "costs of suit," and do not necessarily include the costs of a reference and award. As to these, I think the parties were entitled to make any agreement they pleased. Here they agreed that these costs should be in the arbitrator's discretion, and he has decided that the plaintiff ought to have them. In my opinion he had power to do so, although the amount recovered would not entitle the plaintiff to the costs of the cause.

Rule absolute.

Attorneys for plaintiff: *Cunliffe & Beaumont.*
Attorneys for defendant: *Emmet, Watson, & Emmet.*

GLADSTONE AND ANOTHER *v.* PADWICK.

May 2.

8 CP 321
14 ChD 13
136

Sheriff—Seizure—"Actual Seizure" under a Fi. Fa.—Bill of Sale bonâ fide and for Valuable Consideration—Notice of Writ having been delivered to the Sheriff to be executed—19 & 20 *Vict. c.* 97, *s.* 1.

An execution-debtor was possessed of a mansion-house and grounds, and also of a farm, which, with the exception of two outlying fields, adjoined the grounds and formed part of one block with them. The farm was in the debtor's occupation, although the accounts were kept distinct. The farmhouse was a mile distant from the mansion-house in a direct line. On the 19th of May, a writ of fi. fa. was executed at the mansion-house by the under-sheriff, who informed the persons in charge there, including the steward of the estate, that all the goods on the estate were seized; and a man was left in possession. No act of seizure was done at the farmhouse or upon the farm on that day, the under-sheriff intending what he had done to be a seizure of the whole; but on the following day a man was put in possession at the farmhouse. The goods on the farm were claimed by assignees under a bill of sale, made for an antecedent debt, and for the purpose of giving it a preference over the execution, and which was executed on the evening of the 19th, after the seizure at the mansion-house was completed. At the time of the execu-

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(1) Law Rep. 2 C. P., at p. 317.

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tion of the bill of sale, it was known to the solicitor of the assignees that the judgment creditor had threatened to seize, and that a writ of fi. fa. on the same judgment had been executed in another county; and it was expected by him, but not known, that a writ had been delivered to the sheriff of the county in which the goods lay:—

Held, that what was done on the 19th of May amounted to an "actual seizure" of the goods on the farm and at the farmhouse, within the meaning of 19 & 20 Vict. c. 97, s. 1.

Semble, that the bill of sale was bonâ fide and for a valuable consideration within the same section.

By Bramwell, B., that there was no notice to the assignees of the bill of sale that the writ in question had been delivered to the sheriff to be executed within the proviso in the same section.

Quære, whether notice of the writ issued in another county was notice within the meaning of the proviso.

SPECIAL CASE stated upon an interpleader issue, raising the questions whether, within 19 & 20 Vict. c. 97, s. 1 (1), a bill of sale made to the plaintiffs by the Duke of Newcastle of the live and dead stock at Hardwick Farm, was, as against the defendant, an execution-creditor of the Duke, bonâ fide, and for valuable consideration; whether, within the same section, there was an actual seizure, under the defendant's writ, of the chattels comprised in the bill of sale before its execution; and whether, assuming that there was no actual seizure, the plaintiffs had, at the time of the making of the bill of sale, notice within the proviso at the end of the section.

The defendant, having recovered judgment against the Duke of Newcastle for 95,000*l.*, issued, on the 15th of May, 1869, a writ of fi. fa. to the Sheriff of Nottinghamshire, under which a warrant was sent down to the under-sheriff on the 18th of May.

At 3.45 P.M. on the 19th of May, the under-sheriff and the sheriff's officer arrived at Clumber, the seat of the Duke in Nottinghamshire. The house, offices, and grounds of Clumber are surrounded by the fields of Hardwick Farm (also called the Home

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(1) 19 & 20 Vict. c. 97, s. 1, enacts that: "No writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person bonâ fide and for valuable consideration, before the *actual seizure* or attachment thereof by virtue of such writ, *provided* such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner."

Farm) and by woods and rough ground—the whole, except two fields, forming one block about two-and-a-half miles square. The fields of the farm lie dispersed over the block, and are in parts separated by patches of wood; the whole extent of the farm is 1500 acres. The farmhouse is, in a straight line, about one mile distant from the mansion-house, by the road nearly a mile and three-quarters. Of the two fields lying outside the block, one is in a different parish, but lies near to the farm—the other is three miles distant; but both were used as part of the farm, and were included in the rent mentioned below. Subject to a term, under which the trustees of his settlement were in possession of the woods, the Duke was tenant for life of the estates, and was in possession of both Clumber and Hardwick; but for some time the accounts had been kept separate; a fixed rent was paid by the Duke to his agent for Hardwick, which was treated as part of the outgoings of the farm, and was accounted for by the agent as part of the rental of the estate; and similarly Hardwick was credited with farm produce and farm labour supplied by Hardwick to Clumber, or to the woods in the possession of the trustees. The farm was managed by a bailiff, resident at Hardwick, under the superintendence of the Duke's agent, who had also the superintendence of Clumber, and was the Duke's steward as well as agent.

At the time of the arrival of the under-sheriff and sheriff's officer at Clumber, the Duke was absent, and there was no steward, agent, or upper-servant there, except the housekeeper, and Smith, the groom in charge of the racing and breeding establishment, who lived in a house within the curtilage. The under-sheriff produced the warrant to Smith, and after inquiring the particulars of the stock upon the farm, told him that he must consider everything as seized under the execution, except the racehorses, which had been already assigned to the execution-creditor, and asked him to tell the sheriff's officer if he saw any attempt to remove anything off the estate, which Smith promised to do. He then told the housekeeper of the execution, that all the effects of the Duke were taken under it, and that she must not suffer anything to be removed. He then drove towards the farmhouse, but meeting with rain, and expecting the arrival at Clumber of the Duke's steward, he returned without reaching it, and without doing anything there to indicate a seizure of the stock occupying the fields through which he passed, because he considered what he had already done to be a seizure of all the stock and goods on the whole estate. On returning to the house, he found the steward arrived, and informed him that he had seized all the effects of the Duke under the warrant. The steward gave him a notice from the trustees, claiming certain articles as heirlooms; and in reply he stated that the farming-stock, and horses, and everything belonging to the Duke, had been seized under the warrant, which he produced. He then left a man in possession and went away. This took place at half-past five o'clock.

On the following day the sheriff's officer went over to the farm, and began an inventory of the stock and effects, and placed a man in possession there. On his arrival there he found notices posted, claiming the goods under the bill of sale to the plaintiffs.

The bill of sale to the plaintiffs was executed by the Duke at ten minutes to six on the evening of the 19th, and was made under the following circumstances. The Duke had purchased of the plaintiffs, as trustees of the residuary personal estate of the late Duke, stock upon the farm which formed part of the residue, for the sum of £8000, of which £6000 remained still unpaid, but secured by his bond. On the 17th of May it was arranged between the Duke's solicitor and the solicitor of the trustees, that a bill of sale of the live and dead stock at Hardwick should be executed by the Duke to the plaintiffs to secure this debt; and the bill of sale was, in fact, executed by the Duke at the time above-mentioned. The object of the arrangement was to defeat the defendant's execution, and to give a preference to the trustees. It was made by the solicitor to the trustees without any previous communication with them, but in the exercise of his general authority, and was afterwards approved by them. Before its execution, it was known to both the solicitors that the defendant threatened to seize under the execution unless £15,000 were paid by the 18th; and it was also known to them that on the 18th of May the defendant had, under a writ to the Sheriff of Middlesex, issued on the 15th of May upon the same judgment, seized the goods of the Duke in his house in London. And they expected, though they did not know, that a writ had been delivered to the Sheriff of Nottinghamshire; and it was in that expectation that the solicitor to the trustees prepared and sent down the notices, which were served on the under-sheriff at Clumber, and were posted at Hardwick.

It was to be taken that the trustees did, on the evening of the 19th, take possession, by the Duke's steward as their agent, of the live and dead stock at Hardwick, unless possession had already been taken by the under-sheriff within the meaning of the statute.

The question for the opinion of the Court, who were to draw inferences of fact, was whether, as regards the goods on Hardwick Farm, the execution or the bill of sale was entitled to priority.

Sir J. D. Coleridge, S.G. (*C. S. Bowen* with him), for the plaintiffs. The case turns upon the construction of 19 & 20 Vict. c. 97, s. 1, within the protection of which the plaintiffs claim to be. That they are holders bonâ fide, and for a valuable consideration under the bill of sale, is clear; they are therefore protected, unless there was an actual seizure previous to the execution of the bill of sale, or unless they are within the proviso at the end of the section, as having received notice that the writ had been delivered to the sheriff to be executed, and remained in his hands unexecuted. They clearly had no such notice. They had notice of the writ issued in Middlesex, but that writ was not one which bound these goods, or under which the levy took place; it is not therefore the writ referred to by the statute. Of this writ they had no notice that it "had been delivered to the sheriff to be executed;" for notice that it was about to be put in execution was not notice of the fact that it was in the course of execution; and not being notice at the time, it could not afterwards become so by the event. Various circumstances might occur to prevent the creditor from carrying out his threat, and the payment of the sum of 15,000*l.* was one such circumstance. Notice of an act of bankruptcy to deprive an execution-creditor of his protection must be precise and certain, not merely constructive and conditional: *Hocking* v. *Acraman.* (1) The question therefore is, whether there had been an "actual seizure." This is mainly a question of fact, but it is subject to certain general principles. The leading principle is, that seizure imports taking actual control of the thing seized. This is forcibly illustrated by the Roman law as to delivery, which required that the thing trans-

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(1) 12 M. & W. 170.

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ferred should be put in the physical power of the transferee: Dig. lib. 41, tit. 2, l. 1, § 21; Pothier Traité de Propriété; Pt. i. c. 2, s. 4, art. 1, Savigny on Poss. (trans. by Sir E. Perry), pp. 142, 157, 170, 173. Although in a contract of sale the English law does not require delivery to perfect it, an illustration of the same principle may be found in the case of acceptance and receipt under the Statute of Frauds, which does not take place unless there is either delivery, or some act "tantamount" to it: *Chaplin* v. *Rogers.* (1) If so much is required in a transaction which is by consent, at least as much must be necessary where the whole is the act of one side only, done against the will of the other. And in the case of a sheriff's levy a similar measure has been applied: *Nash* v. *Dickenson* (2), and *Blades* v. *Arundale.* (3) The words of the statute are "actual seizure," which mean more than that merely constructive seizure which alone took place here. That the word "actual" is used with a design, is shewn by the proviso, which allows the validity of a bill of sale taken after notice of delivery of the writ for execution, provided it no longer remains unexecuted: that is, after the sheriff has seized what he considers enough, the execution-debtor is to be at liberty to deal freely with the rest of his property. But the sheriff's duty is to seize only so much as is necessary: *Gawler* v. *Chaplin* (4); he is therefore to discriminate what he does seize from what he does not, and only what he clearly indicates to have been taken by him can be said to be "actually seized." It is not necessary to say what exact mode should be adopted; probably any goods on the spot, and already inventoried, would have been seized, but a mere formal taking of possession at Clumber cannot amount to a seizure at Hardwick, more than a mile off, and held as a separate possession, and in fields separated by intervening property of other owners; this is only such a formal and fictitious possession as is referred to in the Bill of Sale Act (17 & 18 Vict. c. 36), s. 7, and is there treated as a nullity. The cases of *Cole* v. *Davies* (5), and *Swann* v. *Falmouth* (6), are not in point; a seizure in the one case in a house, in the other on a wharf, was held to be a seizure of all the goods in it. But there is

(1) 1 East, 192.

(2) Law Rep. 2 C. P. 252.

(3) 1 M. & S. 711.

(4) 2 Ex. 503; 18 L. J. (Ex.) 42.

(5) 1 Ld. Raym. 724.

(6) 8 B. & C. 456.

a broad distinction between goods in a house or wharf (1), and goods scattered over open fields, and even within the protection (as here) of a different house.

Denman, Q.C. (*F. H. Lewis* with him), for the defendant, was not called upon.

Martin, B. We are both of opinion that the defendant is entitled to our judgment. The case is one of the greatest importance to sheriffs, for, if the plaintiffs succeeded, the sheriff would be liable to an action by the execution-creditor, in which the measure of damages would be the value of the goods which he has failed to seize.

The case turns upon the question, whether what has been done here was an "actual seizure," within the 1st section of 19 & 20 Vict. c. 97. Two other questions have been raised: the first, whether this bill of sale was "bonâ fide and for valuable consideration," within the meaning of the statute. We are not obliged to decide this question; but I have no doubt whatever that it is perfectly competent for a debtor to execute a bill of sale in order to favour a particular creditor, and give him a priority over an execution which is expected to be levied, and that, apart from the bankruptcy laws, there is nothing fraudulent in such a transaction. With respect to the second of these questions, which turns upon the proviso of the section relating to notice, I should, if the matter should hereafter call for a decision, be prepared to entertain the question whether, if notice were given that execution would immediately issue, and that notice were followed up by placing the writ in the hands of the sheriff before the accruing of the title under a bill of sale, the case would not fall within the proviso I have referred to. At present I say nothing upon it.

I rest my judgment entirely on the fact that there was here an "actual seizure" under the writ. I am clearly of opinion that Clumber and the farm were one thing—there was one possession of them; and what was done in one part was the same as if it had been done in the whole. It is not because the accounts of the two were kept distinct, for the purpose of ascertaining whether the

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(1) See Savigny on Possession, p. 160.

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occupation of the farm was a profitable one, that they are really two distinct things. The Duke of Newcastle was therefore possessed of the mansion-house, offices, and farm as of one whole thing; and, as was held in *Swann* v. *Falmouth* (1), and *Cole* v. *Davies* (2), the seizure was effectual over the whole extent of the property.

The law as to writs of execution is very clearly laid down at pp. 219 f. and g. of 1 Williams' Saunders, in the note to the case of *Wheatley* v. *Lane;* and it appears from this note that the common law attached but little importance to the possession of a chattel; for notwithstanding that a chattel was, so far as any one knew or could tell, in the possession of a judgment-debtor, yet on the signing of judgment and the teste of the writ of execution—a matter of which the public in general were invincibly ignorant—the goods of the debtor were bound as against every one; they were so far bound that it was not competent to the debtor to give a title to them except by sale in market overt, which gives a title against all the world. Similarly, a bill of sale executed in Cornwall would pass at once the property in things situated in Northumberland, and the assignee acquired a title without any change of possession or any notice to other persons. Further, the rule prevailed that property draws possession with it; and though, for technical reasons, the assignee of chattels might not be able to maintain trespass in respect of goods of which he had never acquired actual possession, yet he might maintain trover; and to maintain this action, some degree of possession is necessary, as is shewn by the old form of declaration. The effect of 29 Car. 2, c. 3, s. 16, was that the writ did not bind the goods till it was delivered to the sheriff to be executed; but this also was an act of which the public knew nothing. The object of the statute now in question (19 & 20 Vict. c. 97, s. 1) was to remedy this inconvenience, and it accordingly provides that the writ shall not bind until the goods are actually seized under it. Whether such a seizure has been made, is a question of fact; and I am of opinion that there was in this case an actual seizure of the goods in question, and that, if a jury were to find the contrary, their verdict would be set aside as contrary to the evidence. [The learned judge then reviewed the statements in the special case, and proceeded.] I have no doubt

(1) 8 B. & C. 456.

(2) 1 Ld. Raym. 724.

that this amounted to an actual seizure. With respect to the Bills of Sale Act (17 & 18 Vict. c. 36), s. 7, which speaks of "formal possession" being taken, I think those words do not refer to any such state of facts as existed here, but that they are illustrated by the case of *Blades* v. *Arundale* (1), where the bailiff merely locked the warrant up in a table-drawer and went away. In such a case, I think, no actual seizure would be made; but where the execution of the writ is carried out, as has been done here, I have no doubt that it is effectual.

BRAMWELL, B. I am of the same opinion. In the first place, I agree that the bill of sale was good. There is no reason why a creditor should not help himself, or why, as against one creditor, a debtor should not favour another. I am also of opinion that there was no notice of this writ within 19 & 20 Vict. c. 97, s. 1. The only notice that was given with respect to it was, not a notice that the writ "had been delivered" to the sheriff, but only that it was probable it would be. A notice of something certain and inevitable—as of the rising of the tide—though given beforehand, might, perhaps, after the event be treated as notice of the fact; but this cannot be said with respect to what is merely probable. Whether notice of the writ delivered to the Sheriff of Middlesex was a notice within the section it is unnecessary to say.

The main question then arises, which is, whether there was here an "actual seizure" before the execution of the bill of sale. To construe the statute, we must consider the inconvenience it was intended to remedy, which was the hardship caused by the existing law to bonâ fide buyers of goods from execution-debtors, against whom a writ of execution had issued, the writ binding the goods upon its delivery to the sheriff, although, by reason of the goods not having been seized, the buyer had no means of knowing it. The present statute substitutes "actual seizure" of the goods for delivery of the writ to the sheriff, as that which is to bind the goods as against purchasers bonâ fide and for valuable consideration; but as no such fiction as *constructive* seizure was resorted to before the Act, the word "actual" is of no peculiar force, and "actual seizure" means no more than "seizure."

(1) 1 M. & S. 711.

The question then is: Had the sheriff seized before the execution of the bill of sale? And in order to see what in effect was done up to five o'clock, we are entitled to look at the account of the subsequent proceedings in order to see the intention of what was done before. It is admitted, and it is clear, that it is not necessary for the sheriff to lay his hand on a single article. The difficulty, then, is to say why what was done was not sufficient, or what more ought to have been done than was done. It is certain that, if the Duke of Newcastle had himself been there, he could not lawfully have removed any of the stock from the farm; and if he had done so for his own purposes, he would have been in danger of an indictment for larceny. It was suggested that more might have been done; but I am of opinion that, where property is all one holding, as it was here, if the sheriff goes and makes known at the mansion-house or dwelling-house of the occupier that he is come to seize, and does, so far as words and intention can go, seize all the goods on that holding, he has done enough. If, indeed, the Duke of Newcastle had occupied another house in a different parish, I should doubt whether what was done at Clumber would have amounted to a seizure of goods there; I think it would not, but it is unnecessary to decide the point. Here it was all one holding; and when the sheriff, being present at the house with the writ of execution, says, "I seize everything on this holding," enough is done to constitute a seizure of the whole.

It is said that, if this is so, the object of the statute will be defeated; but that is not so. Suppose the Duke of Newcastle, not knowing what had taken place at Clumber, had sold part of the stock on Hardwick Farm, and the buyer complained of the hardship of having his purchase overridden by the execution-creditor, he would be open to the answer, that he trusted the Duke personally. If, on the other hand, he had assumed the cattle to be the property of the Duke because he was the occupier of Clumber, the answer would be that, if he had gone to Clumber, he would have found it in the occupation of the execution-creditor. And, further, if everything had been done which has been suggested as necessary to a seizure, the same hardship might have happened, unless the whole were kept under lock-and-key. The case of *Cole*

v. *Davies* (1), which lays down that seizure of a part in the name of the whole is seizure of the whole, is, I think, good law.

It was argued that the words of the proviso in the latter part of the section shew that "actual seizure" has an extended meaning, and that, after the writ has been executed, and therefore when it no longer "remains unexecuted," a good title can be made to goods not actually seized, notwithstanding notice of the writ. But my understanding of this part of the section is, that it is not enough, to prevent a stranger from acquiring title to the goods, to know of a writ having been issued; but that, if there be notice that it is delivered to the sheriff to be executed, though not executed in fact, and it is afterwards executed, that is enough to prevent a stranger from acquiring title to the goods as against the execution-creditor, for it is enough to give him warning not to buy.

On these grounds, therefore, I am of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.

Attorneys for plaintiffs: *Duncan & Murton.*
Attorneys for defendant: *Robson & Tidy.*

STEVENS *v.* CHAPMAN.

May 4.

Costs—Cause and all Matters in Difference referred—Costs of Cause to abide "Event of Reference"—County Courts Act, 1867, *s.* 5.

A cause and all matters in difference were referred, and it was ordered that "the costs of the cause should abide the event of the reference, and that the costs of the reference and award should be in the discretion of the arbitrator." As to the cause, the arbitrator awarded a verdict for the plaintiff for 259*l.* 1*s.*; as to the other matters in difference, he found that 242*l.* 13*s.* 10*d.* was due to the defendant from the plaintiff, and directed that this sum should be deducted from the damages and costs recoverable in the action, and that the defendant should pay the plaintiff the balance:—

Held, that although the arbitrator had decided something in favour of each party, and although the difference between the two sums awarded did not exceed £20, the "event of the reference" was such as to entitle the plaintiff to his costs of the cause, and he was not deprived of them by the County Courts Act, 1867, s. 5.

THIS was an action on a promissory note for 229*l.* 16*s.* 6*d.*, payable on demand. The defendant traversed the making of the note, and pleaded failure of consideration and a set-off.

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(1) 1 Ld. Raym. 724.

1871

STEVENS. v. CHAPMAN.

The cause was entered for trial at the Devon Summer Assizes, 1870, but the record was withdrawn, and the cause and all matters in difference referred by judge's order to an arbitrator. The submission contained the following clause as to costs:—

"It is hereby agreed that the costs of the cause shall abide the event of the reference, and that the costs of the reference and award shall be in the discretion of the arbitrator."

The arbitrator (who had the same powers as a judge at nisi prius to amend and certify) awarded as to the cause in favour of the plaintiff on all the issues, and assessed his damages at 259*l.* 1*s.*; and as to the other matters in difference he awarded that there was due from the plaintiff to the defendant upon a balance of certain farming accounts between them 242*l.* 13*s.* 10*d.* He further directed that the last-mentioned sum should be allowed out of and deducted from the amount of damages and costs recoverable by the plaintiff in the action, and that the defendant should pay the plaintiff the balance of such damages and costs accordingly; and he ordered each party to bear his own costs of the reference, and to pay one-half the costs of the award.

The Master having declined to tax the plaintiff his costs of the cause, Hannen, J., made an order directing him to do so.

A. Charles moved for a rule calling on the plaintiff to shew cause why the order should not be rescinded. The clause as to costs is not in the usual form, the parties having agreed that they shall abide the "event of the *reference*." The question, therefore, is, whether the general event is such as to entitle the plaintiff to the costs of the cause. He is not entitled, inasmuch as the arbitrator did not decide everything referred in his favour: *Boodle* v. *Davies* (1); and the fact that in the result a balance remains to be paid over to the plaintiff makes no difference: *Gribble* v. *Buchanan* (2); *Reynolds* v. *Harris* (3). Again, the event here is a liability to pay the difference between 259*l.* 1*s.* and 242*l.* 13*s.* 10*d.*; the arbitrator's direction that the latter sum should be deducted from the damages and costs of the action being founded on the erroneous impression that the costs of the action could be recovered by the plaintiff, and amounting to no more than a direction that the 242*l.* 13*s.* 10*d.* should be deducted from the damages: *Moore* v. *Watson* (1). The plaintiff, therefore, has recovered less than 20*l.*, and having received no certificate is deprived of costs under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. The parties in making their bargain as to the event of the reference governing the costs must be taken to have done so having regard to the law upon the subject. The County Courts Act applies to references by consent: *Cowell* v. *Amman Colliery Co.* (2); *Smith* v. *Edge.* (3)

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(1) 3 A. & E. 200.

(2) 18 C. B. 691; 26 L. J. (C.P.) 24.

(3) 3 C. B. (N.S.) 267; 28 L. J. (C.P.) 26.

4 Jun 1886

Cur. adv. vult.

Later in the day the following judgments were delivered:—

KELLY, C.B. I think there should be no rule. By the order of reference the costs of the cause are directed to abide the "event of the reference," and on looking at the award we find that the arbitrator has found all the issues in the cause for the plaintiff, and directed a verdict for 259*l.* 1*s.*, and in my opinion the words used as to the costs must be taken to be equivalent to "event of the reference as far as the action is concerned." Upon that construction the plaintiff is clearly entitled to his costs. We were pressed during the argument with the two cases of *Boodle* v. *Davies* (4), and *Gribble* v. *Buchanan* (5). With regard to the former, the arbitrator did not award for the plaintiff expressly in the cause, but although he did find that the trespasses complained of had some of them been committed, he simply awarded that "the action should cease." So that he cannot be said to have decided *the cause* there in favour of the plaintiff. As to the second case, the costs of the reference, and those only, were to abide the event of the award, the costs of the action being otherwise provided for. The most, therefore, that the decision amounts to is, that where the costs of the *reference* are to abide the event of the reference, and the reference is partially in favour of one and partially of the other, each shall bear his own costs, though there be a substantial balance payable by one to the other. The decision, therefore, is not in point, and I do not think that we should be governed in this case by it. The rule must accordingly be refused.

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(1) Law Rep. 2 C. P. 314.

(2) 6 B. & S. 333; 34 L. J. (Q.B.) 161. 11 Jur NS 687.

(3) 2 H & C. 659; 33 L. J. (Ex.) 9.

(4) 3 A. & E. 200.

(5) 18 C. B. 691; 26 L. J. (C.P.) 24.

MARTIN, B. I am of the same opinion. I have no doubt that the intention of the parties was that the plaintiff, if successful in the action, should have the costs of the action, and I think the words used express that intention. They appear to me to mean that the costs of the cause shall abide the event of the reference of the cause. I may add, that from the terms of his award this was clearly the construction which the arbitrator put upon them, and it seems to me to be the true construction.

BRAMWELL, B. I also think that this rule should be refused. It is contended that this reference has had no such "event" as to entitle the plaintiff to his costs of the cause, which are to follow the event of the reference, because the arbitrator has not decided everything referred to him in favour of one party. I do not assent to this view of the matter. It does not seem to me sound in principle, and none of the authorities cited decide the point. I think the true construction of the clause, which is not in the ordinary form, is this: that the costs are not to go as the cause is determined, but as the reference is determined, and that if the defendant could overtop the plaintiff's claim in the cause he was to have the costs, but that if he fell short of it the plaintiff was to have them. On the construction contended for, the plaintiff would be placed in a singular position, for he would run the risk of losing the costs of the cause, in which we may assume he had good reason to believe he should be successful, in case the arbitrator found anything, however small, in favour of the defendant in respect of the other matters in difference. That certainly cannot have been his real intention in consenting to the reference, and I do not think the words used compel us to a construction which would end in such a result. Then as to the balance between the amount recovered in the cause and that payable to the defendant in the reference being less than 20*l.*, I do not think it material. The plaintiff, who has made this special arrangement as to his costs cannot be said to "recover" the balance within the meaning of the County Courts Act, 1867, s. 5. If the record were made up, judgment would, I presume, be signed in the action for the whole amount of the verdict awarded.

CLEASBY, B. I am of the same opinion. None of the cases cited are precisely in point, though *Gribble* v. *Buchanan* (1) closely resembles this case. But there the costs of the cause were ordered to follow the event of the cause, so that the only question which arose was as to the costs of the reference, and whether, when they were to abide the event, either party could recover them, unless everything was decided in his favour. Here the costs of the cause are to abide the event of the reference, and I think that "event" has been, on the true construction of the submission, such as to entitle the plaintiff to the costs of the cause.

Rule refused.

Attorneys for defendant: *Coode, Kingdon, & Cotton.*

CARSTAIRS AND ANOTHER *v.* TAYLOR.

April 20.

Landlord and Tenant—Occupiers of Upper and Lower Floors—Collection of Water.

7 B366
9 Ex 66
2 ExD 3.
2 CPD. 24
4 ExD. 78

The plaintiffs hired of the defendant the ground-floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the plaintiffs' goods. The defendant had used reasonable care in examining and seeing to the security of the gutters and the box. In an action by the plaintiffs against the defendant for the damage so caused:—

Held, that the defendant was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse.

ACTION tried before Martin, B., at the Liverpool Spring Assizes, 1871. On the 4th and 5th counts (2) the plaintiffs were nonsuited,

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(1) 18 C. B. 691; 26 L. J. (C.P.) 24.

(2) The 4th and 5th counts, and the pleas to them, were as follows:—

4th count: "That the defendant was possessed of and occupied a warehouse, and the plaintiffs became and were tenants to the defendant of the ground-floor of the warehouse, upon the terms (amongst others) that the defendant

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leave being reserved to them to move to enter a verdict on those counts for 90*l.*, upon the following facts:—

The plaintiffs hired of the defendant, upon no special terms as to repairs, the ground-floor of a warehouse at Liverpool, for the purpose of storing rice. The defendant himself occupied the upper floor, where he stored cotton. The water from the roof was collected in gutters, which terminated in a wooden box resting on the wall, and partly projecting over it on the inside; thence the water was discharged by a pipe into the drain. The gutters and box were examined from time to time by a person employed by the defendant, and they had been, in fact, examined and found secure on the 18th of April; but between that day and the 22nd a rat gnawed a hole in that part of the box which projected on the inside of the wall; on the latter day a heavy storm occurred, and the collected rain-water passed through the hole into the upper floor of the warehouse, and thence reached the ground-floor and injured the plaintiffs' rice. The gutters and box were constructed in the mode ordinarily used in Liverpool.

April 20. *Benjamin* moved in pursuance of the leave reserved. The defendant is liable on the ground of contract; he has impliedly undertaken that the warehouse let to the plaintiffs shall be suitable for the purpose for which it is let, which cannot be said to be true if it is accessible to water or to rats: *Francis* v. *Cockrell* (1).

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should and would at all times during the tenancy keep the roof of the warehouse in good and tenantable repair, order, and condition; that the defendant was in the possession and occupation of the whole of the warehouse, except the ground-floor, yet the defendant did not during the tenancy keep the roof in good and tenantable repair, order, and condition, by reason whereof large quantities of water penetrated the roof and the upper floors, and flowed down into the ground-floor, occupied by the plaintiffs, and wetted, damaged, and destroyed goods of the plaintiffs, being in the said ground-floor."

5th count: "That before, &c., the plaintiffs were possessed of and occupied the ground-floor of a warehouse, and the defendant was possessed of and occupied all the upper floors of the warehouse; and the defendant so negligently and improperly used and managed the said upper floors that large quantities of water, which the defendant had suffered to collect in and upon the said upper floors, penetrated and flowed from the upper floors into the ground-floor so occupied by the plaintiffs, and wetted, damaged, and destroyed goods of the plaintiffs being in the said ground-floor."

Pleas: 8 to the 4th count, denial of the tenancy on the terms alleged; 9 to the same, denial of the breach; 10 to the 5th count, not guilty.

(1) Law Rep. 5 Q. B. 501.

[MARTIN, B., referred to the note to *Pomfret* v. *Ricroft.* (1)]

Independently of contract, and without negligence, he is liable; for by what he has done he has collected the water from the roof in a particular manner, and has poured it upon the plaintiffs' premises. He is, therefore, within the rule established in *Chauntler* v. *Robinson* (2) and *Rylands* v. *Fletcher.* (3) In *Bell* v. *Twentyman* (4), the defendant was held liable for an obstruction caused in his land, but without his default, to a watercourse which flowed on to the plaintiff's land, although he removed the obstruction within a reasonable time after notice. The observations of the Court, made in their considered judgment (at p. 774), are strongly in favour of the plaintiffs. But this case is stronger; for here the defendant "maintained in a defective state" an apparatus which by reason of its original imperfect construction in projecting inwards, made this accident possible: *Alston* v. *Grant.* (5) At least the defendant was liable on the ground of negligence; both in having the apparatus so constructed, and in not providing against rats: *Laveroni* v. *Drury.* (6)

[MARTIN, B. That case turned entirely on the terms of a bill of lading.]

KELLY, C.B. [After stating the facts the learned Judge continued:—] It has been argued that the defendant was liable on the ground either of contract or of a duty imposed by law. It is unnecessary to consider whether, as between landlord and tenant, where the landlord is in possession of the upper floor, and the tenant of the lower, there is an implied contract by the landlord so to maintain the part of the premises in his possession as not to permit damage to happen to the tenant through any ordinary causes. Assuming that there is such an implied contract, or assuming that, independently of the relation of landlord and tenant, there is a duty on the owner and occupier of the upper part of a house so to manage and keep it as to prevent the happening to the occupier of the lower floor of accidents arising through ordinary causes, the plaintiffs would not be entitled to recover. The complete performance of any such contract or duty would not have guarded against the mischief in question. It is not that the defendant left the roof out of repair, or did any act directly occasioning the passage of the water; but the cause of the mischief was, that a rat had shortly before the accident eaten its way through the box into which the gutters discharged themselves, and made a hole through which the water poured into the warehouse. Clearly there is no duty on the occupier above, whether he be landlord or only occupier, to guard against an accident of this nature. It is absurd to suppose a duty on him to exclude the possibility of the entrance of rats from without. The case of a ship is totally different: it may be possible to insure freedom from rats in a vessel; but it is impossible to say with respect to warehouses generally that this can be done.

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(1) 1 Wms. Saund. 322, n. (1).

(2) 4 Ex. 163.

(3) Law Rep. 3 H. L. 330.

(4) 1 Q. B. 766.

(5) 3 E. & B. 128; 23 L. J. (Q.B.) 163. 18 Jur 332.

(6) 8 Ex. 166; 22 L. J. (Ex.) 2.

The cases relied upon do not approach the proposition contended for. *Francis* v. *Cockrell* (1) only establishes that if a person hires the use of a thing, there is an implied undertaking, on the part of the person who receives the consideration, that the thing shall be reasonably fit for the purpose for which he lets it; and it cannot be contended that the premises let to the plaintiffs were not reasonably fit for a warehouse. In *Bell* v. *Twentyman* (2) a watercourse passed through the land of one person into the land of another, and there was a duty on the owner through whose land it passed to keep it clear of ordinary obstructions. The course was obstructed by the bricks of a fallen wall; and the plea averred, not that the bricks were removed within a reasonable time of the accident, but only that they were removed within a reasonable time of notice. Whatever doubt may arise upon some expressions used by the Court, the decision is only that the plaintiff was not bound to give notice, nor the defendant entitled to wait for it. (3) In *Rylands* v. *Fletcher* (4), what happened was the necessary and inevitable consequence of what the defendant did; and in his judgment in the Exchequer Chamber (1), Blackburn, J., alludes expressly to two exceptions from liability—the act of God and vis major. Here the accident was due to vis major, as much as if a thief had broken the hole in attempting to enter the house, or a flash of lightning or a hurricane had caused the rent. There is, therefore, no foundation for the plaintiffs' claim, and the rule must be refused.

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(1) Law Rep. 5 Q. B. 501.

(2) 1 Q. B. 766.

(3) In *Bell* v. *Twentyman* (1 Q. B. 766) the declaration alleged, and the plea did not deny, a duty on the defendant to cleanse the watercourse; and the judgment of the Court appears to be pronounced with reference to this admitted duty. In the sentence beginning, "If the defendant was liable on general principles, he was to cleanse and keep open the watercourse at all events" (p. 774), there appears to be an error in punctuation, and that there ought to be a comma after the word "liable."

(4) Law Rep. 3 H. L. 330.

BRAMWELL, B. I am also of opinion that there should be no rule. The argument has satisfied me to a considerable extent, but its last link fails. I am satisfied that the defendant conducted the water to the place where it escaped. He may therefore be said, in a sense, to have poured the water on to the plaintiffs' premises, which is more accurate than to say that the water escaped, or to use any other expression which speaks of the water as though it were an active agent. The defendant made a gutter, of such a shape, character, and direction, that when the hole in question had been made, the water poured into the plaintiffs' premises. Suppose that an ordinary cistern were pierced by a stranger, and the water in consequence escaped, the proximate cause of the accident would be the act of the person who pierced the cistern; the owner of the cistern could not be said to have poured the water upon his neighbour's premises, unless he afterwards filled the cistern. But the defendant has here conducted the water to the place from which it poured on to the plaintiffs' premises, and he may therefore be said to have poured it on to them. So far the case resembles *Rylands* v. *Fletcher* (2); and I am satisfied that it makes no matter that the defendant is the plaintiffs' landlord, but that the case must be argued as if there had been a severance of the freehold.

But I am clearly of opinion that there is a material difference between the cases. In *Rylands* v. *Fletcher* (2) the defendant, for his own purposes, conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiffs. If they had been adjacent owners, it would have been for the benefit of the adjacent owner that the water from *his* roof

(1) Law Rep. 1 Ex. at pp. 279, 280.
12 Jur NS 604

(2) Law Rep. 3 H. L. 330.

was collected, and the case would have been within the decision in *Rylands* v. *Fletcher* (1); but here the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit. Similar considerations apply to the case of *Bell* v. *Twentyman* (2); the stream flowing through the defendant's land flowed there for his benefit; it was his property, and he could not say that he was doing something for the benefit of the plaintiff jointly with himself. But here the plaintiffs must be taken to have consented to this collection of the water which was for their own benefit, and the defendant can only be liable if he was guilty of negligence.

Is there, then, any evidence of negligence? I think not. It is said there was negligence in so constructing the box that if a hole were made in this place the water would enter the warehouse. But how can it be said that there was negligence, when it was constructed in the way in which such things are ordinarily constructed? When it is repaired, it will probably be repaired in such a way that this accident cannot occur again; but, as I have often said, to treat this as evidence of negligence is to say that whenever the world grows wiser it convicts those that came before of negligence. It is said that rats can be easily got rid of out of a warehouse; but, assuming it to be so, it is no negligence not to take means to get rid of them till there is reason to suppose they are there; and it cannot be said that persons ought to anticipate that rats will enter through the roof by gnawing holes in the gutters.

PIGOTT, B. I am of the same opinion.

MARTIN, B. I am of the same opinion. A warehouse is built with gutters, which carry off the water from the roof into a box, from which pipes convey it into the drains; all this is done in the mode ordinarily used in such buildings. The plaintiffs take of the defendant the lower storey on no special terms, the defendant occupying the upper floor. Now, I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently.

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(1) Law Rep. 3 H. L. 330.

(2) 1 Q. B. 766.

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CARSTAIRS *v.* TAYLOR.

Probably the defendant was under a liability to use reasonable care in keeping the roof secure, but he cannot be held responsible for what no reasonable care and vigilance would have provided against. He cannot certainly be considered guilty of negligence, for he caused the roof to be examined periodically, and it was, in fact, examined and found secure only four days before the occurrence complained of. He has acted with care, and performed the whole of the duty that was cast upon him. He is charged upon an implied duty; and with respect to duties implied by law, the true rule is laid down in *Parradine* v. *Jane* (1): "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused." The distinction between such a liability and one created by express contract is pointed out in what follows: "But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." That rule is an answer to the plaintiffs' claim. At the trial my impression was that the rule laid down by Rainsford, J., in *Pomfret* v. *Ricroft* (2), that the lessor was bound to repair, was the law, but it appears by the note to that case (note 1) that it is not so. The decision in *Rylands* v. *Fletcher* (3) has really no bearing on the case; it referred only to the acts of adjoining owners of land.

Rule refused.

Attorney for plaintiffs: *H. G. Field, for Etty, Liverpool.*

(1) Aleyn, at p. 27.

(2) 1 Wms. Saund. 322.

(3) Law Rep. 3 H. L. 330.

1871
May 1.

THE BIRMINGHAM AND STAFFORDSHIRE GAS COMPANY *v.* RATCLIFF.

Compulsory Reference—Matter of "Mere Account"—Suggestion of Fraud—Common Law Procedure Act, 1854, *s.* 3.

The plaintiffs sued the defendant for 7,129,300 cubic feet of gas sold and delivered, during a period of nearly five years, at a price of 2*s.* 5*d.* per cubic foot. The defendant, as to part of the claim, paid money into court, and pleaded, as to the residue, "never indebted" and payment. He then obtained an order, under the Common Law Procedure Act, 1854, s. 3, compulsorily referring the action, on the ground that the matter in dispute was wholly or in part one of "mere account," which could not conveniently be tried by a jury. The plaintiffs applied to rescind this order, alleging that they proposed at the trial to attempt to prove that the defendant had been guilty of fraudulent conduct by the secret abstraction of their gas, and that upon this question, which would regulate the damages awarded, they were entitled to the verdict of a jury:—

Held (by Channell and Pigott, BB., Kelly, C.B., dissenting), that the nature of the dispute was not altered because the plaintiffs imputed fraud to the defendant in relation to it; that, substantially, the matter was one wholly or in part of mere account, which could not be conveniently tried by a jury, and that therefore the order was rightly made.

In this case the writ was specially endorsed in the following manner:—

"1865, 9th October to 9th May, 1870. The plaintiffs claim 668*l.* 18*s.* 7*d.*, the balance due on the following account:

	£	*s.*	*d.*
7,129,300 cubic feet of gas consumed during the above period, at 2*s.* 5*d.* per 1000 cubic feet	861	9	2
Paid on Account	192	10	7
	668	18	7

Amount due, being for the quantity improperly taken without passing through the meters, and for gas supplied between 4th January and 9th May, 1870."

The declaration was for gas sold and delivered, gas supplied, and for money due on accounts stated. The defendant, except as to 150*l.* (which he paid into Court) pleaded never indebted and payment; and immediately afterwards, on the 29th of June, 1870, applied (under the Common Law Procedure Act, 1854, s. 3) to Cleasby, B., for an order to refer, upon the ground that the matter in dispute consisted, "wholly or in part, of matters of mere account, which could not conveniently be tried in the ordinary way." (1) In opposition to this application, the plaintiffs filed affidavits, to the effect that they proposed to prove at the trial that the greater part of the gas now sought to be recovered for, had been secretly abstracted, with the privity of the defendant, from their mains, and conveyed through service-pipes to the defendant's premises without being in any way connected with the meters which registered the consumption. A large number of burners and a blowpipe had been, as they alleged, supplied in this clandestine manner with gas. The defendant absolutely denied all knowledge of any improper abstraction of the gas, although he admitted that, owing to the carelessness of his men, some gas had been used which had not passed through the meter; but the plaintiffs contended that they had a right to submit the question to a jury, and that if the jury should find in their favour, no question of account would be involved at all, inasmuch as "omnia præsumuntur contra spoliatorem," and the right measure of damages would be the greatest amount of gas which could pass in the given time through the service-pipes in question. Cleasby, B., made the order, and in Hilary Term last a rule to rescind it was obtained on the part of the plaintiffs.

April 29. *Manisty, Q.C.*, and *J. W. Mellor* shewed cause. They cited *Imhoff* v. *Sutton* (2).

Sir J. B. Karslake, Q.C., *Field, Q.C.*, and *A. Wills*, supported the rule.

Cur. adv. vult.

May 1. The following judgments were delivered:—

Pigott, B. The question raised by this rule is, whether we ought to rescind my Brother Cleasby's order for compulsory reference under the 3rd section of the Common Law Procedure Act, 1854. The reference was to a master; and what we have to determine is, whether the matter in dispute consists wholly or in part of matters of mere account, which cannot be conveniently tried in the ordinary way. I am perfectly satisfied on the latter point, that the action could not be conveniently tried, but would certainly be ultimately referred, because no jury would be able to follow all the details. Now, as to whether the cause of action consists wholly or in part of matters of "mere account," the particulars shew that it is for 7,129,300 cubic feet of gas, consumed during a period of nearly five years, at a price of 2*s.* 5*d.* per cubic foot. It seems to me that this is a matter of "mere account," and nothing has been urged to shew the contrary. The contention amounts only to this, that the case should go to a jury, because it may become a question how the gas was taken, and it may be necessary to say whether it was taken by the defendant fraudulently or not. That does not, however, alter the matter in dispute, which is, how much gas was taken, and what its price was? The tort, if there be any, is waived by the plaintiff bringing his action in contract, and the question of fraud is quite collateral. The arbitrator need not find at all whether it was taken fraudulently or not; and though it may be a mode of proving the utmost amount that was taken, to shew some fraud to induce a jury, or the arbitrator, to take an unfavourable view of the defendant's case—still, that is a mode of proof, and does not prevent the question from remaining a matter of account. I think, if we were to determine that because fraud may come in incidentally or collaterally, an action should not be referred, we should greatly embarrass those who have to make these orders. On the ground, therefore, that the nature of the dispute is not altered, because the plaintiff may seek to impute fraud to the defendant in relation to the subject-matter of the action, I think the rule should be discharged.

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(1) The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 3, enacts that "if it be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, ... to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court . . . . upon such terms as to costs and otherwise as such court or judge shall think reasonable."

(2) Law Rep. 2 C. P. 406.

CHANNELL, B. I also think the rule should be discharged. The question is, whether the learned Judge had power under the Common Law Procedure Act, 1854, to make the order; for if he had no jurisdiction, no question of discretion arises. What, then, is the action? Looking to the pleadings and particulars, I think that, according to the true construction of the statute, this is a matter of "mere account." I do not go the length of saying that because the plaintiff has declared in contract, that of itself shews this to be matter of account. He might have had a difficulty in declaring otherwise, because the transaction which he proposes to attempt to prove might have amounted to a felony. But the question between the parties depends on the quantity of gas consumed. It is true it is not simply a case of measurement; the taking of the account may be attended with more intricacy than in the ordinary case. Still, the question to be decided remains the same. Even if it becomes necessary to apply the rule which presumes everything "contra spoliatorem," the application of that rule would still be only a mode of ascertaining how much gas the defendant has used. It is not the less an account between the parties, because the plaintiff is entitled, from something incidental, to call on the arbitrator to put a more favourable construction on the evidence he brings forward, than would be put upon it under ordinary circumstances.

KELLY, C.B. I regret to differ from the rest of the Court in this case, which is not a mere question of practice, but a most important one on the construction of the Common Law Procedure Act, 1854. In order to make out the plaintiffs' claim, three matters of fact must be ascertained: first, the number of burners and blowpipes; secondly, the quantity of gas which would be consumed by the burners and blowpipes during the eight hours which is the time during which the gas is lighted; and thirdly, the number of years during which this consumption has been going on. But, looking to the facts that appear on the affidavit, I find that the plaintiffs allege that some gas has been clandestinely obtained by the defendant, and that it is for this reason that the measurement of the meters is not sufficient—as in an ordinary case it would be—to ascertain the amount. The question which will arise will be, whether the pipes by which this gas was so obtained were laid down in the time of the defendant's occupation or not. If they were, he must have been a party to the laying them down, and must know when it took place; and should a jury come to the conclusion that the gas had been secretly taken, with his privity, they would be justified in making, and no doubt would make,

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every presumption against him. The real question in the cause appears to me to be whether these pipes were laid down by the defendant or not, and it is one which must be decided by examination of the place, taking up the flooring, and so on, to ascertain when the change was made; and I cannot hold that under these circumstances the matter in dispute is one of mere account. Whether a matter may be referred under the statute depends, not on what may be the nature of the case as it appears on the declaration or pleas, but on what, in fact, is the substantial controversy in the cause. The whole of the proposed evidence, as well as the question raised by the pleadings, must be, in my opinion, taken into consideration in determining whether the question in the cause is a question of "mere account." Taking this view of the matter, I think that the learned Judge had no power, under the Act, to make this order. But, as a majority of the Court are of a contrary opinion, the rule will be discharged.

Rule discharged.

Attorneys for plaintiffs: *Tucker & Lake.*
Attorneys for defendant: *Iliffe, Russell, & Iliffe.*

May 3.

SLATER *v.* PINDER.

Bankruptcy Act, 1869—*Execution—Seizure and Sale—Seizure before Act of Bankruptcy—Sale after Adjudication.*

6 Ch 38-9
7 Ch 315, -6, -8

An execution creditor, for a sum less than £50, who has seized the goods of a bankrupt before the committing of any act of bankruptcy is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale. *Ex parte Veness* (Law Rep. 10 Eq. 419) discussed.

Affirmed in Exch Ch L R 7 Ex 95

13 Eq 316, 7
16 Eq 100-1
7 Ch 302
17 Eq 453
7 Ch 412
QB 290

SPECIAL CASE stated by order of Brett, J., under the Common Law Procedure Act, 1860, s. 15.

The plaintiff is trustee of the property of George Allen, a bankrupt, and the defendant is an execution creditor of Allen.

On the 12th of August, 1870, the defendant recovered judgment against the bankrupt for 49*l.* 13*s.* 7*d.*, and on the 19th of August, 1870, issued a fi. fa., under which, on the same day, the sheriff seized. On the 20th of August, 1870, a petition for adjudication in

Ch 432. 446 10 QB. 488. 14 Ch D. 136
Eq 437. 1 Ex D. 300 15 Ch D. 459
Ch D. 490 3 C P D 408 11 QBD 243

bankruptcy was duly presented against Allen; the act of bankruptcy on which the petition was founded was committed on the same day. On the 22nd of August, 1870, at 11.45, A.M., Allen was adjudicated bankrupt, and the plaintiff was afterwards duly appointed trustee. At twelve o'clock the sale commenced under the execution, and proceeded until two o'clock, when notice of the adjudication was given to the sheriff and the defendant, and the sale was stopped. The questions for the Court are, whether the trustee is entitled to the proceeds of the sale, or only to what may remain after satisfying the execution; and whether, supposing the above-mentioned proceeds are not sufficient to satisfy the execution, the defendant is entitled to have the residue levied out of the goods which at the time when he and the sheriff had notice remained unsold. (1)

(1) The following sections of the Bankruptcy Acts of 1849 and 1869 are material:—

The Bankruptcy Act, 1849, s. 133, enacts that "all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale before the date of the fiat or the filing of a petition for adjudication in bankruptcy, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person at whose suit or on whose account such execution or attachment shall have issued had not at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed."

S. 184 enacts that "no creditor having security for his debt, or having made any attachment in London, or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution . . . served and levied by seizure and sale upon . . . any part of the property of such bankrupt before the date of the fiat, or the filing of a petition for adjudication in bankruptcy."

The Bankruptcy Act, 1869, enacts:

S. 12. "Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act. But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed."

S. 13. "The Court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy; or it may allow such proceedings, whether in progress at the commencement of the bankruptcy, April 24. The case was heard before Martin and Bramwell, BB.

E. Thomas, for the plaintiff. By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 14, 15, and 17, upon the appointment of a trustee all the property belonging to the bankrupt at the commencement of the bankruptcy vests in him. Now in this case the commencement of the bankruptcy was on the 20th of August, when the property in question was unquestionably in Allen, since by seizure only an execution creditor does not alter the property in the goods seized: *Giles* v. *Grover*. (1) This being so, *sale* as well as seizure before adjudication was necessary to protect the creditor. For by 32 & 33 Vict. c. 71, s. 95, subs. 3, which deals with "protected transactions," it is enacted that any execution against a bankrupt's

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or commenced during its continuance, to proceed upon such terms as the Court may think just. The Court may also, at any time after the presentation of such petition, appoint a receiver or manager of the property or business of the debtor against whom the petition is presented, or of any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof."

S. 14 provides for the appointment of a trustee, and s. 15 defines the property of the bankrupt divisible among his creditors. S. 17 vests the bankrupt's property in the trustee upon his appointment.

S. 87. "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff . . . shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff . . . has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

S. 95. "Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader . . . the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy . . .

Sub-s. 3. "Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(1) 9 Bing. 128.

goods, executed in good faith by seizure *and sale*, before the date of the order of adjudication shall be valid, notwithstanding any prior act of bankruptcy, if the execution creditor had not notice of any act of bankruptcy at the time of such seizure and sale. The language used must be taken to apply to cases where the seizure precedes, as well as where it follows, an act of bankruptcy. Express protection, therefore, being afforded to executions levied by seizure and sale, it follows that an execution levied by seizure only is not protected. The 184th section of 12 & 13 Vict. c. 106, is, it is true, repealed by 32 & 33 Vict. c. 83 (Bankruptcy Repeal Act, 1869), but it is by implication re-enacted by 32 & 33 Vict. c. 71, ss. 12, 13. The mere circumstance of seizure does not constitute the execution creditor a "secured" creditor, who is defined by 32 & 33 Vict. c. 71, s. 16, as any one "holding any mortgage, charge, or lien," on the bankrupt's estate. The reasoning of Bacon, V.C., in *Ex parte Veness* (1) supports the plaintiff's contention, and neither the decision in that case nor in *Ex parte Todhunter* (2) is inconsistent with it. Lastly, s. 87, which applies in terms only to cases where goods are seized for a debt of more than 50*l.*, and which makes executions voidable for fourteen days after actual sale, if the sheriff should within that time have notice of a petition in bankruptcy having been filed, throws light on the intention of the legislature in cases where the seizure is for less than 50*l.* Can it have been intended to make seizure sufficient in the latter case, and yet leave the execution in the former voidable, though seizure and sale have taken place?

Cohen, for the defendant. The seizure by the defendant was before any act of bankruptcy, and that being so, the creditor was in a position of one holding security; and the only legislative enactment which could have deprived him of the benefit of his security was 12 & 13 Vict. c. 106, s. 184. But that section has been repealed by 32 & 33 Vict. c. 83, and is not re-enacted either expressly or by implication by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). That Act only contains the same general provisions vesting the bankrupt's property in the assignees or trustees as all previous Bankruptcy Acts had done; but these leave the position of an execution creditor who has seized before any act of bankruptcy un-

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(1) Law Rep. 10 Eq. 419, at p. 423.

(2) Law Rep. 10 Eq. 425.

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touched: *Thomas* v. *Desanges* (1); *Balme* v. *Hutton* (2); *Giles* v. *Grover* (3); *Samuel* v. *Duke* (4); *Hutton* v. *Cooper* (5); *Edwards* v. *Scarsbrook* (6); *Young* v. *Roebuck* (7); Williams' Bankruptcy Law and Practice, pp. 103-5. The effect of these decisions was to establish a broad distinction between seizure before and seizure after an act of bankruptcy. In the former case the creditor did not require protection. His title was perfected subject only, between 1849 and 1869, to the necessity imposed upon him by 12 & 13 Vict. c. 106, s. 184, of selling before the date of the fiat or the filing of a petition for adjudication. The decision in *Ex parte Veness* (8) may be supported on the facts of the case, inasmuch as, according to one view of them, an act of bankruptcy had been committed prior to seizure by the execution of a bill of sale by the bankrupt. The dicta relied on were therefore unnecessary to the actual decision; and both in that case and in *Ex parte Todhunter* (9) the Chief Judge recognises the repeal of s. 184 of 12 & 13 Vict. c. 106. Both cases, moreover, were decided on the liquidation clauses of the new Act.

[MARTIN, B., referred to *Wilbraham* v. *Snow* (10) as shewing that an execution levied by seizure bound the debtor's goods.]

It certainly bound them in the absence of any statute to the contrary, according to the general principles of the bankruptcy law which are still in force (see 32 & 33 Vict. c. 83, s. 20), and are to be considered as governing the construction of the new Act: see per James and Mellish, L.JJ., in *Ex parte Tempest* (11).

[BRAMWELL, B. It seems strange that in cases under s. 87 executions may be avoided for fourteen days after actual sale, and yet that in other cases seizure should alone suffice to protect the creditor.]

It is an anomaly, but such an anomaly would not warrant the inference that s. 184 of 12 & 13 Vict. c. 106, is re-enacted; and it may be explained by the consideration that the execution by seizure and sale in a case under s. 87 is in itself made an act of bankruptcy by s. 6, subs. 5: see *Ex parte Key*. (1)

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(1) 2 B. & Ald. 586.

(2) 9 Bing. 471.

(3) 9 Bing. 128, at p. 140.

(4) 3 M. & W. 622.

(5) 6 Ex. 159; 20 L. J. (Ex.) 123.

(6) 3 B. & S. 280; 32 L. J. (Q.B.) 45.
9 Jur N.S. 537,

(7) 2 H. & C. 296; 32 L. J. (Ex.) 260.

(8) Law Rep. 10 Eq. 419.

(9) Law Rep. 10 Eq. 425.

(10) 2 Wms. Saund. 47 a.

(11) Law Rep. 6 Ch. at pp. 75, 76.

Thomas, in reply.

Cur. adv. vult.

May 3. In consequence of the importance and novelty of the question, and of the reasoning contained in the judgment of Bacon, V.C., in *Ex parte Veness* (2), upon which the plaintiff relied, Martin and Bramwell, BB., directed the case to be reheard before four judges, and *Cohen* accordingly re-argued it for the defendant before Kelly, C.B., Martin, Channell, and Cleasby, BB.

During the course of the argument Martin, B., read the following judgment, which he had prepared after the first hearing, as expressing the opinion he had then formed on the case:—

This is a special case which was argued before my Brother Bramwell and myself. The facts are very clear and simple. The plaintiff is the trustee of one Allen, a bankrupt. On the 20th of August, 1870, a petition for adjudication was presented against him. The act of bankruptcy was committed the same day. On the 22nd of August at a quarter before twelve he was duly adjudicated bankrupt; the order of adjudication is dated the same day, and the plaintiff is the trustee. On the 12th of August the defendant recovered a judgment against the bankrupt for 49*l.* 13*s.* 7*d.* On the 19th of August he issued a fi. fa. directed to the sheriff of Middlesex. On the same day the sheriff levied. On the 22nd at 12 o'clock he commenced to sell, and about 2 o'clock, and whilst the sale was proceeding, notice of the adjudication was given to him and the defendant. The questions submitted to the Court are: first, whether the plaintiff (the trustee) is entitled to the proceeds of the sale, or only to what may remain after satisfying the execution; secondly, whether, supposing the proceeds are not sufficient to satisfy the execution, the execution creditor is entitled to have the residue levied out of the goods unsold when he and the sheriff had notice of the adjudication. I am of opinion that the trustee is entitled only to the proceeds which remain after satisfying the execution, and the defendant (the execution creditor) is entitled to have the residue of his debt levied out of the goods unsold at the time of the notice. The question depends upon the construction of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and is of very considerable importance.

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(1) Law Rep. 10 Eq. 432.

(2) Law Rep. 10 Eq. 419.

The first contention on behalf of the plaintiff (the trustee) was founded upon the 95th section. I am clearly of opinion, however, that this enactment has reference to a different state of things, and does not affect the present question. It is a clear principle in bankrupt law, recognised and adopted by the 11th section of the present Bankruptcy Act, that upon the commission of an act of bankruptcy the title of the assignee had relation back to the time of the act of bankruptcy, and the goods of the bankrupt became the goods of the assignee from that time. A legitimate consequence of this doctrine was, that if a sheriff levied after the act of bankruptcy under an execution against the bankrupt, he levied not upon the goods of the bankrupt, but upon the goods of the assignee, and was a wrongdoer as against him, and liable to an action for the value of the goods.

The operation of this doctrine was, that if a man committed an act of bankruptcy at any time within the period prescribed by the Statutes, and the petitioning creditor's debt then existed, it was competent for the assignee, upon a fiat issuing, to maintain an action against the sheriff as a wrongdoer for levying under an execution against the bankrupt which he was at once bound to execute and of the existence of which he was at the same time in invincible ignorance, a circumstance which rendered him liable to an action as a wrongdoer. The Bankrupt Act, 6 Geo. 4, c. 16 (ann. 1825), afforded some remedy to this injustice by enacting, in the 81st section, that executions bonâ fide executed or levied more than two months before the issuing of the commission (the then initiation of proceedings in bankruptcy) should be valid, notwithstanding any prior act of bankruptcy committed by the bankrupt. The 95th section of the present Act is in furtherance of the same principle; instead of giving the protection to the execution being executed and levied two months before the bankruptcy, it gives it to the seizure and sale before the order of adjudication; but they were both enacted with the same object, viz. to protect the execution creditor and the sheriff against the operation of a prior act of bankruptcy, and have no bearing upon the present question where the seizure was before the act of bankruptcy.

This will be found very clearly explained in the case of *Edwards* v. *Scarsbrook* (1). The statute 12 & 13 Vict. c. 106, s. 133, was in furtherance of the same object, to relieve the execution creditor and the sheriff from the operation of the doctrine of relation, and does not apply to the present case. But the learned counsel for the plaintiff further contended that, by the 15th section, all property which belonged to or vested in the bankrupt at the commencement of the bankruptcy became vested in the trustee, and was divisible amongst the general body of creditors; and that by the 12th section no creditor had any remedy against the property of the bankrupt except in the manner directed by the Act; and his contention was, that notwithstanding at the commencement of the bankruptcy the sheriff was in possession of the goods, still by reason of the property in the goods being then in the bankrupt the goods became freed from the sheriff's right to possession, and became the property of the trustee in the sense that he was legally entitled to the present possession adversely to the sheriff. I am of opinion that this is not the true construction of the statute. To elucidate this question it is necessary to go back to what is generally spoken of as the first Bankrupt Act, viz. the 13 Eliz. c. 7. By the 2nd section it enacts, amongst other things, that the assignee shall take the bankrupt's goods and chattels wherever they may be found and known. At this time, upon the issuing of a writ of fi. fa., the goods of the defendant were said to be bound from its teste, and in the interval of time between the enactment of this statute and the 21 Jac., a question had arisen whether as between the plaintiff, as an execution creditor, and the assignee of a bankrupt, the plaintiff who had issued a writ of fi. fa. before the act of bankruptcy was entitled to the goods against the assignee, and the judgment was that he was so entitled; for by s. 9 of 21 Jac. c. 19, it is enacted that a creditor having security for his debt by judgment, whereof there is no execution served and executed upon the goods of the bankrupt before he became bankrupt, shall not be relieved for any more than a rateable portion of his debt with the other creditors, without respect to his security.

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(1) 3 B. & S. 280; 32 L. J. (Q.B.) 45. 9 Jur. N.S. 1[illegible]7

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Now, two things are observable from this enactment: first, that the binding of the goods by reason of the issuing the fi. fa. before the bankruptcy was no longer to be of avail, but that the execution must be served or executed upon the goods in order to defeat the right of the assignee; and, secondly, that the right or claim which the judgment creditor had upon the goods of his debtor is called a security.

The 6 Geo. 4, c. 16, does not seem to have made any material alteration in the law in regard to seizures or levies made before the act of bankruptcy. But the before-mentioned statute, 12 & 13 Vict. c. 106, s. 184, enacts, very much in the language of the 21 Jac., that no creditor having security for his debt of the goods and chattels of the bankrupt shall receive upon such security more than a rateable part of such debt, except in respect of an execution served and levied by seizure and sale before the date of the fiat or the filing of the petition. Upon this section the Court of Queen's Bench held, in the before-mentioned case of *Edwards* v. *Scarsbrook* (1), that when the order of things was—first, seizure; secondly, act of bankruptcy and notice; thirdly, sale; and fourthly, adjudication—the execution creditor was entitled to the proceeds of the goods; and the Court of Exchequer held, in *Young* v. *Roebuck* (2), that where the adjudication preceded the sale the assignee was the party entitled. I entirely concur with both these judgments; but this section is now repealed, and has not been re-enacted, and in my opinion the present case depends upon the true construction of the 12th and 15th sections of the now existing Bankrupt Act.

The 15th section enacts that the property of the bankrupt divisible amongst the creditors shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy. Now had this been the only provision I should have been clearly of opinion, in analogy to the principles long established under the former law, that it only passed to the trustee that which belonged to the bankrupt beneficially, and was subject to all lawful charges and claims of third parties. The word "property" is ambiguous as regards goods, and property in goods may be in a bankrupt, so as to make him the sufferer in the case of their destruction, although a third person may lawfully hold possession of the goods until a claim upon them be satisfied, as in the case of a pledgee or other bailee with an interest, or an unpaid vendor; or the word "property" may mean the corpus and substance itself, as a horse or other chattel is said to be the property of its owner. But it was argued that the 12th section enacted that no creditor shall have any remedy against the property or person of the bankrupt in respect of his debt except in manner directed by the Act. If it was necessary, I should be prepared to hold that "property" here means the same thing as "property" in the 15th section; but the remaining part of the section puts it beyond doubt; it enacts that it shall not affect the power of the creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security. Now, the words "holding a security" are the words used in the 9th section of 21 Jac. and the 184th section of 12 & 13 Vict. c. 106, to describe the interest of the plaintiff in an execution under which a sheriff has seized and is in possession of goods, and in my opinion the interest of such execution creditor is expressly protected.

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(1) 3 B. & S. 280; 32 L. J. (Q.B.) 45.
(2) 2 H. & C. 296; 32 L. J. (Q.B.) 260.

9 Jur. N.S. 187

It only remains to notice the 87th section of the new Act, to which reference was made by the learned counsel for the plaintiff. It enacts that when the goods of a bankrupt trader have been taken in execution on a judgment for a sum exceeding 50*l.*—the judgment in the present case is for a sum under 50*l.*—the sheriff shall retain the proceeds in his hands for fourteen days, and certain other consequences follow. This enactment has nothing to do with the present case, it was an enactment of absolute necessity. The 6th section made an execution against a debtor, a trader, to obtain payment of not less than 50*l.* levied by seizure and sale an act of bankruptcy. Except for the 87th section the sheriff would have been bound to pay the execution creditor the amount of the levy immediately upon its realization, and at the same time upon the adjudication of the execution debtor to be bankrupt would have been liable to pay the value of the goods seized to the trustee by the operation of the doctrine of relation before referred to. This section is enacted for the avoidance of this injustice, and also perhaps to put such a creditor in the same position as the general creditors.

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I have entered into the grounds of my judgment thus largely, because this question perpetually occurs at chambers upon interpleader summons, and it is very desirable that it should be settled.

At the close of the argument the Court delivered judgment as follows:—

KELLY, C.B. I think the defendant is entitled to our judgment. It appears that he was the execution creditor of one Allen, a bankrupt. The judgment was dated on the 12th of August, 1870. On the 19th of August a fi. fa. was issued, and seizure under it took place on the same day; on the 20th there was an act of bankruptcy committed, followed by a petition for adjudication, and on the 22nd at 11.45 A.M. adjudication took place. At 12 o'clock a sale commenced under the execution, and part of the bankrupt's effects was sold. Before the sale was over, however, notice of the adjudication was given to the sheriff and the defendant, and the proceedings were stopped until the rights of the parties interested should be ascertained. The substantial question now is, whether the execution creditor—the goods having been seized by him before any act of bankruptcy had been committed—is to be defeated by reason of the adjudication in bankruptcy preceding the sale.

Now, down to the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), there can be no doubt that seizure entitled the execution creditor to the goods of a bankrupt, or their proceeds, as against an assignee in bankruptcy, unless before such seizure an act of bankruptcy had been committed. But by s. 184 of that Act it was provided that where an act of bankruptcy occurred before the execution had been perfected by seizure and sale, the title of the assignee should prevail; and thus the law stood until 1869, when the 184th section of the Act of 1849 was repealed. Unless, therefore, the new Bankruptcy Act contains any provisions amounting either expressly or by implication to a re-enactment of the Act of 1849, s. 184, the execution creditor would, in the case before us, be entitled to recover; and I cannot find any such provisions in the Act.

It has been well observed by Mr. Cohen, in his comments on *Ex parte Veness* (1), that the question is not, as there seems to be indicated, whether a seizure by an execution creditor is protected by statute, but whether the old common law of bankruptcy, as we may call it, prevails; and whether an act valid in itself has been nullified by some positive legislative enactment. I cannot find any enactment in the Act of 1869 which would have any such effect. Section 95, subs. 3, does not apply at all to this case. With regard to s. 12, which enacts that "where a debtor shall be adjudicated a bankrupt, no 'creditor' to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy, shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by this Act," it might be contended, if the words stopped at this point, that an execution creditor, being a "creditor," was within the language of the section. But then the proviso goes on to enact that "this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not passed;" and it is clear from the authorities that the words "creditor holding security" comprise an execution creditor who has seized before any act of bankruptcy has been committed. Therefore, the previous portion of the section is set aside by the proviso as far as regards an execution creditor who has seized, and the only question is, whether his right to sell the goods, founded as it is upon his seizure before any act of bankruptcy, is defeated or nullified by any express legislative provision. I cannot find any enactment of the sort, and therefore the defendant is, in my opinion, entitled to our judgment.

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(1) Law Rep. 10 Eq. 419.

It is said that the decision of Vice-Chancellor Bacon in *In re Veness* (1) is contrary to this decision, or at all events that the reasoning of that learned and eminent judge is opposed to it; and no doubt there are expressions in the judgment which seem to indicate that the judge considered that an execution creditor who had seized prior to any act of bankruptcy required protection by statute if his title were to avail against the assignee, or rather trustee. "Laying aside," he says (at p. 423), "all considerations appertaining to the law of relation in bankruptcy (on which I do

(1) Law Rep. 10 Eq. 419.

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not think it necessary or expedient now to pronounce any opinion), it seems that a trustee having been appointed, and the date of his appointment being the commencement of the liquidation (the period at which the property vests in him), and of the same force and effect as if an order of adjudication in bankruptcy had on that day been made, it cannot be questioned that any execution levied on such property would be ineffectual against the trustee unless it is protected by some provision of the statute. The only protection applicable in this case is to be found in the 3rd division of the 95th section, which renders valid any execution against the goods of a debtor, executed in good faith by seizure and sale before the date of the adjudication, if there was not at the time of the seizure and sale notice of any act of bankruptcy committed by and available against the debtor for adjudication."

Now if this language is taken strictly, it is certainly, in my opinion, not in accordance with the law. An execution levied by seizure before any act of bankruptcy is primâ facie effectual, and needs no protection whatever, and, as the only statute which nullified it has been repealed and not re-enacted, remains effectual although adjudication in bankruptcy may occur before sale.

MARTIN, B. This case was argued last week before my Brother Bramwell and myself, and I retain the opinion which I then formed, and which, I may observe, is in accordance with the view expressed by the Messrs. Williams in the excellent edition of the new Bankruptcy Act they have recently published.

CHANNELL, B. I am of the same opinion. The question is really short and easy. Down to the year 1849 the execution creditor in a case like the present would clearly have been entitled as against the assignees of the bankrupt, seizure having taken place before any act of bankruptcy. But s. 184 of the Act of that year rendered sale before the petition for adjudication essential, and thus the creditor's right was limited. That section is repealed, and there is not, so far as I can see, any corresponding enactment in the Act of 1869. This disposes of the case, but a re-argument was deemed advisable, for the reasons stated by my Brother Martin. Upon careful investigation of the facts, however, I do not think

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the decision in *Ex parte Veness* (1) inconsistent with our judgment, although there may be expressions in the reasoning of the learned judge in that case which appear to be inconsistent with what I consider to be the true view of the law. The judge ruled correctly, both in *Ex parte Veness* (1) and in *Ex parte Todhunter* (2), that s. 184 was repealed, and was not re-enacted. If he intended to decide also that an execution creditor who had seized before an act of bankruptcy requires statutory protection, I think he was in error. He had, at common law, a valid title by such seizure, of which he could only be deprived by express statutory enactment; and the section which did deprive him having been repealed, his title is now perfectly good, and he does not need to be protected. My judgment, therefore, is for the defendant.

CLEASBY, B. I am of the same opinion. I think that the case of *Edwards* v. *Scarsbrook* (3) is decisive in favour of the defendant. Many old difficulties have been touched upon in the argument and first principles appealed to, as to which there has never been a question. The bankruptcy of a man cannot deprive his creditor of an acquired right; and a creditor who has lawfully seized his debtor's goods under an execution before any act of bankruptcy has acquired a right of which he cannot be deprived except by the provisions of an Act of Parliament. Now 12 & 13 Vict. c. 106, s. 184, did deprive the execution creditor of his former right, but it has been repealed, and there is no equivalent enactment in the present Act. The 95th section, subs. 3, does not apply to the present case at all, but only to executions levied by seizure and sale without notice at the time of such seizure and sale of any act of bankruptcy; that is, according to *Edwards* v. *Scarsbrook* (3), of any act of bankruptcy prior to seizure. If the seizure is first in time the creditor wants no protection.

Then with regard to the two decisions of the Chief Judge in Bankruptcy, which are both, it should be remarked, upon the liquidation clauses of the Act of 1869, they appear to me to be consistent with each other, and not to be opposed to our judgment in this case. There was a difference, in fact, between the two cases. In *Ex*

(1) Law Rep. 10 Eq. 419. (2) Law Rep. 10 Eq. 425.
(3) 3 B. & S. 260; 32 L. J. (Q.B.) 45. 9 Jur. N.S. 7

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parte Veness (1) the trustee was appointed before, and in *Ex parte Todhunter* (2) after sale. And, reasoning upon the various clauses and rules in reference to liquidation by arrangement, the judge comes to the conclusion that the date of the sale is the material point, and accordingly decides one case for the trustee, and the other against him. But he does not, as I understand him, in the passage which has been read by the Lord Chief Baron, lay it down as a principle of ordinary bankruptcy law that an execution levied by seizure before an act of bankruptcy requires the protection of some statute as against the assignee. Nor does he in any way question *Edwards* v. *Scarsbrook* (3), which, as I have said, really decides the present case. Whatever, therefore, be the true meaning of the passage in question, I do not feel that, in coming to the conclusion that the defendant is entitled to judgment, we are in conflict with the actual decision of the Chief Judge in the case relied on by the plaintiff.

Judgment for the defendant.

Attorney for plaintiff: *Barnett.*
Attorneys for defendant: *Cooper & Holmes.*

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(1) Law Rep. 10 Eq. 419. (2) Law Rep. 10 Eq. 425.
(3) 3 B. & S. 260; 32 L. J. (Ex.) 45. 9 Jan [illegible]

[IN THE EXCHEQUER CHAMBER.]

1871 0/
May 18.

KENDAL *v.* WOOD AND ANOTHER.

Partners—Authority of one Partner to bind another—Mistake of Fact—Voluntary Payment.

5 ChD 784
6 App Cas
186
[illegible]

The plaintiff and Woolnough were partners, and during the partnership had dealings with the defendants. Woolnough was indebted to them on his own account, and at his request they applied 1000*l.* of the partnership money, paid by him to them, to the liquidation of his private debt. The plaintiff did not know of or authorize this mode of applying the money, and had not conducted himself in such a manner as to make it reasonable for the defendants to believe that he had authorized it, but they did in fact believe he had.

Upon the dissolution of the partnership, it appeared from the accounts that the firm owed the defendants more than 5000*l.*, and the plaintiff accepted bills for the whole balance apparently due. These bills were handed to the defendants for the purpose of being discounted. Before they arrived at maturity, the plaintiff discovered the application by the defendants of the 1000*l.* to Woolnough's private debt. He nevertheless met the bills, at the same time informing the defendants that he did so under protest, and only to save his father's credit, whose name was on the bills as drawer. In an action to recover the 1000*l.*, as money paid under a mistake of fact:—

Held, first, that the defendants could not retain the money as against Woolnough's private debt, the plaintiff never having authorized its appropriation to that debt, nor conducted himself so as to give them reasonable grounds for believing that he had; and, secondly, that the plaintiff having been ignorant of the real facts of the case when the bills were drawn, had not precluded himself from recovering by meeting them at maturity when he had discovered the facts, inasmuch as his so doing could not be regarded as a voluntary act.

Error from the decision of the Court of Exchequer in favour of the defendants on a special case.

The action was brought to recover £1000 for money received by the defendants for the plaintiff's use. The plaintiff is a cotton spinner at Manchester, and the defendants are cotton dealers at the same place, carrying on business under the name of "G. & E. Wood." Prior to 1862, the plaintiff's business was carried on by one Woolnough, in partnership with Thomas Rowbotham. In April, 1862, the partnership was dissolved, and Rowbotham assigned his interest to Woolnough, who took on himself all the liabilities of the firm. At this time the firm was indebted to the defendants in the sum of more than 3000*l.* for cotton supplied.

Decided in the sitting after Easter Term 1870

Rowbotham was to be paid an agreed sum for his share of the partnership property, and on account of that sum he received from Woolnough promissory notes to the amount of 8000*l.*

In April, 1862, the plaintiff became Woolnough's partner in the business, and they continued to carry it on until October, 1866. The plaintiff was not aware when the partnership was arranged that Woolnough had given the promissory notes above mentioned to Rowbotham; nor did he know that Woolnough had not paid Rowbotham for his share in the business. Neither of these circumstances came to his knowledge until after the bankruptcy of Woolnough in 1867.

During the existence of the firm of Woolnough & Kendal, Woolnough managed the business and kept the books. The partnership was dissolved in October, 1866, when Woolnough owed the plaintiff 4000*l.* on the partnership account. Upon the dissolution, the plaintiff took upon himself all the liabilities of the firm.

During the whole period of their partnership, Woolnough and the plaintiff purchased cotton from the firm of G. & E. Wood; and there were extensive dealings between them of which accounts current were from time to time rendered. To these the plaintiff had access, but in point of fact they were not examined by him until after the dissolution of the partnership.

Upon the dissolution of partnership, the defendants claimed of the plaintiff a balance of 5758*l.* The plaintiff examined the books, and finding that substantially they disclosed that sum to be due, paid it by 758*l.* in cash, and three acceptances for 5000*l.*

In April, 1867, Woolnough became bankrupt, and the plaintiff was appointed creditors' assignee. Among the bankrupt's papers he found, together with other documents, two receipts dated respectively the 4th and 22nd of May, 1866, signed by the defendants, which purported to be on account of cotton supplied by them to the firm of Woolnough & Kendal. In consequence of this discovery, the plaintiff investigated the accounts current between the defendants and Woolnough & Kendal, and he then discovered that credit had not been given for the amount represented by the receipts. The circumstances under which the receipts were given were as follows:—

On the 4th of May, 1866, Woolnough paid the defendants 500*l.*

of the partnership moneys, and they gave him the receipt of that date, but at Woolnough's request they credited him with this sum, and appropriated it in liquidation of some of the promissory notes which had been made by Woolnough in favour of Rowbotham, and by him endorsed to them. A further sum of 500*l.* was paid by Woolnough to the defendants on the 22nd of May, 1866, for which they gave the receipt of that date. This amount was first of all entered in the daybook thus:—"Cr. Woolnough & Kendal," but the word "Kendal" had afterwards been struck through, and the money was credited in cashbook and ledger to Woolnough. It was applied by the defendants, at his request, in a similar manner to the former sum of 500*l.*

The several sums above mentioned were all entered in the cashbook of Woolnough & Kendal as having been paid to the defendants. Woolnough never told the plaintiff how he had caused them to be dealt with; nor had he any authority, in fact, to appropriate them as he had done, but the defendants believed he had. Four years previously Woolnough had appropriated partnership funds in a similar manner, and accounts had been sent in in which those funds had not been duly credited.

The last of the acceptances (which was for 2000*l.*) given by the plaintiff to the defendants to discharge the balance of 5768*l.* came due on the 15th of June, 1867, and the plaintiff, although at that time he had discovered Woolnough's dealing with the partnership funds, paid it. He, however, at the same time informed the defendants that he did so simply on account of his father's name being attached as drawer to the bill, and gave them notice that he paid "under protest of non-indebtedness," and that he was about to take immediate steps to recover the amount.

The question for the Court, who were to draw inferences of fact, was whether the plaintiff was entitled to recover the several sums of money which Woolnough had caused to be applied in the manner stated in the case.

The case was argued in the Court of Exchequer on the 8th of June, 1869, by *Manisty, Q.C.* (*Jordan* with him) for the plaintiff, and *R. G. Williams* for the defendants. The Court were equally divided in opinion upon it, Kelly, C.B., and Bramwell, B., giving judgment for the defendants, and Pigott and Cleasby, BB., for the plaintiff. Cleasby, B., withdrew his judgment, and the plaintiff brought error.

May 18, 1870. *Manisty, Q.C.* (*Jordan* with him), for the plaintiff. The defendants' mere belief that the partnership money was applied to the payment of Woolnough's debt with the plaintiff's authority is not enough to furnish a defence to this action, there being no authority in fact and no conduct on the plaintiff's part from which authority might reasonably be inferred: *Leverson* v. *Lane* (1); *Heilbut* v. *Nevill.* (2) The money now sued for was paid under mistake of fact. It was not paid voluntarily, nor has the plaintiff been guilty of any such carelessness as disentitles him to recover.

R. G. Williams for the defendants. Had the partnership continued to exist, the action would not have been maintainable, for Woolnough must have been joined as plaintiff: *Wallace* v. *Kelsall* (3); *Brownrigg* v. *Rae* (4); *Gordon* v. *Ellis* (5); *Jones* v. *Yates* (6); and the dissolution of the partnership cannot give Kendal a better right than he had before: Lindley on Partnership, vol. 1, p. 170. Again, when the plaintiff met his acceptance, he knew the real state of the accounts, and having paid the money, he cannot recover it back as having been paid under a "mistake of fact." The payment was voluntary. It was not one he was bound to make: *Marriott* v. *Hampton* (7); *Barber* v. *Fox* (8). There is nothing in the case to shew that the bill was in the hands of third parties, when perhaps the payment being to save credit, might be considered compulsory.

Manisty, Q.C., in reply.

COCKBURN, C.J. (after referring to the facts of the case) proceeded:—The question that first arises, is whether the defendants at the time they received this money, or at the time they appropriated it to the satisfaction of Woolnough's debt, knew it was partnership money. Of that I think there cannot be the slightest doubt; because, in the first place, the facts shew that the money must have been paid in satisfaction of partnership liability, and, though it may have been that while the transaction was *in fieri*, the other partner may have directed the appropriation of the money to the satisfaction of his own debt, it is clear from the fact of his having at first sought to apply it to the satisfaction of the partnership debt, and a receipt having been given expressly as for money received on account of the partnership debt, the defendants must have known, or have had every reason to know—and to my mind it is the same thing—that this was partnership property. Then comes the next question: had they knowledge or had they reasonable ground to believe that Woolnough had the authority of his partner to apply the partnership money in satisfaction of his own debt? Now the fact turns out to be, and it is a fact beyond dispute, that Woolnough had no such authority to apply the money in satisfaction of his own debt. But, assuming that he had, or that the defendants had reason to believe that he had, would that alter the law applicable to the case? As it seems to me, there is no ground here for saying that we can probably infer that the defendants had *reasonable* ground to believe that Woolnough had such authority. It is true that, four years before, Woolnough had, in like manner, appropriated the partnership funds to the liquidation of his own debts to the defendants; and it is also true that accounts had been sent in in which sums of money had not been credited to the partnership, as they ought to have been if the money in question had been properly appropriated to the satisfaction of the partnership debt. But those transactions were by four years anterior to the transaction which we are now inquiring into, and it does not seem to me to be reasonable to assume that because a man four years before may have had the authority of his partner for applying partnership funds in a particular manner, he should continue to have it.

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(1) 13 C. B. (N.S.) 278; 32 L. J. (C.P.) 10.

(2) Law Rep. 4 C. P. 354; Law Rep. 5 C. P. 478.

(3) 7 M. & W. 264.

(4) 5 Ex. 489.

(5) 7 M. & G. 607.

(6) 9 B. & C. 532.

(7) 2 Sm. L. C. 6th ed. p. 375.

(8) 2 Wms. Saund. at p. 137, k.

Therefore I assume, from the state of facts, that there was no authority on the part of Woolnough thus to apply the partnership funds, and that there was no belief on reasonable grounds in the minds of the defendants that he had that authority.

Now it appears to me quite clear that this is not a transaction

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good in point of law. Assuming the law to be as stated in Smith's Mercantile Law, 7th ed. p. 45, and adopted by the Court of Common Pleas in the case of *Leverson* v. *Lane* (1) which has been cited, it is this:—"The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by shewing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so." Now, here the misappropriation of partnership funds being without authority and without reasonable belief on the part of the defendants that Woolnough had received that authority, the transaction is one which cannot be sustained. I must not be taken to admit that reasonable belief will suffice in absence of actual authority. I am strongly of opinion that if a creditor of one of two partners chooses to take from his debtor what he knows to be partnership securities or partnership funds, without ascertaining whether the debtor has the authority of his partner as to this application of the partnership funds, he does so at his own peril, and it is not enough that he has even reasonable cause to believe in the existence of the authority. But, as I have said, it is not necessary, in the view I have taken of the matter, to decide that point or to quarrel with the proposition as laid down, because it seems to me that the facts here would not warrant the inference of there being any reasonable cause for the belief, assuming, as on this special case we must, that belief to have been entertained.

The transaction, then, is void. No doubt there are technical difficulties which might in some other form of proceeding have presented themselves as insuperable obstacles in the plaintiff's way. Suppose an action had been brought while the partnership existed, on behalf of the partnership, to recover back this money, there would have been the fatal difficulty that the delinquent partner must have been a party to the proceedings. But we are cleared from any difficulty arising from the necessity of Woolnough, the delinquent partner, being made a party to the suit. He is not a necessary party; the plaintiff brings this action

(1) 13 C. B. (N.S.) 278; 32 L. J. (C.P.) 10.

upon the ground of having paid the money sued for in ignorance of the fact that there had been any misappropriation of the partnership funds, and in ignorance of his own position relatively to the claim made against him, and in ignorance of the real state of the account between his firm and the defendants. Then Mr. Williams puts his case on another ground, namely, that this was a payment made by the plaintiff after he had become aware of those facts upon which he now rests his present demand. Now, it is true that an acceptance which had been given by the plaintiff for a sum of money, including the sum which he now seeks to recover, was paid by him on its becoming due, and it became due after his ignorance had been dispelled and he had knowledge of the fact. But the acceptance was given while he was still in ignorance, and when it became due he paid it under protest. Mr. Williams says that makes no difference as regards the effect of the payment. Be it so; but there are other circumstances which I think ought to be taken into account. In the first place, the acceptance was given for a larger sum, although it comprehended the sum now under discussion; and a man might well doubt whether he would be at liberty, when he has given a bill or acceptance upon which he is partially liable, to refuse payment of that acceptance when due. But it is quite clear that if the acceptance was in the hands of a third party who might hold it for value, he would have no defence. I gather from the statement of the case that this bill had been given for the purpose of being discounted by the defendants; that the bill had been discounted, and was at that time in the hands of third parties; added to which, the father's name was to it as the drawer of the bill with the concurrence of the defendants, and the father's commercial position, as well as the plaintiff's, would have been seriously affected by this bill being refused payment. As I have already said, as regards part of it, the plaintiff was not in a situation to deny the validity of the bill, and I do not think he was bound to expose himself to an action, which certainly would have been brought against him or his father. I do not think, therefore, that that is such a payment as disentitles the plaintiff to recover in the present action.

BLACKBURN, J. I also agree that the plaintiff is entitled to recover the sum of £1000. The real difficulty is in ascertaining what the facts are. When once they are ascertained, if they are ascertained in the way in which I understand them, I do not think there is any difficulty in point of law. The plaintiff here, at the time of the dissolution of the partnership, was under the belief that there was a sum of more than £5000 due to the defendants; and, being under that belief, he gave them money to that amount, including, among other things, bills of exchange, the last of which was for £2000. Before that bill of exchange became due, he believed he had discovered, and as I shall shew presently he was right in believing it, that so much was not due, and that when he accepted these bills on the supposition that this £5000 and more was due from himself and Woolnough (his partner) to the defendants, he was in reality paying £1000 too much. Entertaining that belief when the £2000 bill was coming due—and I certainly agree with my Lord that the inference of fact is that the bill was in the hands of a third person and that he could not refuse to pay it—he wrote to the defendants, telling them that the acceptance was given under a mistake, but that for the sake of his father's credit he sent the £2000 that the bill might be taken up and not returned; but he does it under protest and without the slightest waiving of his right to demand back the money, it having been paid to the defendants under a mistake of facts. Mr. Williams argued that whatever might be the merits of the case in other respects, inasmuch as the plaintiff knew all that he now knows, his honouring the bill under those circumstances made the payment by him a voluntary payment. But I take it that if the bill was in the hands of a third person, which I am inclined to think it was, he had no defence, and he could not help himself. But suppose it was not, I think if a man accepts a bill under those circumstances and meets and retires it to save the credit of his father and his own, he is quite as much under compulsion and pressure as where, for example, he pays money under protest for goods detained under a mistaken claim of money due for their carriage; so that that point lies clearly out of the case.

Then comes the question: When he accepted this bill which he ultimately honoured, was it under a mistake of facts? The belief under which he accepted the bill was, that he and his fellow-partner owed the sum of money which is stated to be the balance of the partnership account; and the allegation is, that facts afterwards came to his knowledge which shewed that 1000*l.* of that had been discharged, and that the balance was 1000*l.* less than he had originally supposed. Now, it is in my mind utterly immaterial whether those facts shew that there was not liability because he had a defence in equity; or there was not liability because he had a defence at law. He paid the money under the belief that he was liable to pay it. I think it is important to mention this, because it is to my mind quite immaterial whether the facts shew a defence at law or in equity.

I now come to the great difficulty in the case; and it here becomes important to recollect what a partner is. A partner is a joint tenant with his fellow partner of the property of the firm, and in respect that there is a joint tenancy of the property of the firm, partners are obliged to be joined in suing, according to *Jones* v. *Yates.* (1) If, then, you can shew that one of them is a party to the thing complained of, you drive the aggrieved partner over to equity instead of law, and this is one of the instances in which the jurisdiction of the courts, not being united in one, sometimes does produce injury. Again, besides the partners being joint tenants, they are also agents for each other; and here there is no difference between law and equity. The one partner is agent for the other partner, and it is an agency to do all the matters which are within the ordinary scope of business which the partners carry on; but when a partner does that which is beyond this primâ facie authority with which he is entrusted, those who deal with him do so at their peril. Now, the giving of partnership money for a private debt is beyond the ordinary authority implied by the name of partner. Those who receive the money ought to satisfy themselves that the partner paying it really has authority; or, probably, if they can shew that the other partner whom he seeks to bind has so conducted himself that they had reasonable ground to suppose there was authority, it would do as well. But where, as in this case, the partner had not authority in fact, but the defendants believed honestly, and perhaps if the defaulting partner was a man of good repute they might say reasonably, that there

(1) 9 B. & C. 532.

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was authority; then, if they are wrong, they cannot fall back on the other partner, and say he is bound, merely because of their belief, unless they shew that the other partner has conducted himself so as to authorize that belief. [The learned judge then referred to the facts of the case in detail, and proceeded:—] I think, when the defendants received this money from the hands of the partners they were chargeable with the money as against the partnership, and if they appropriated it afterwards to Woolnough's own debt, they were doing it in the honest but unwarrantable belief that he had authority so to appropriate it; and consequently they are not discharged of the money. Therefore, when the plaintiff Kendal paid the whole of the money, he paid it under a mistake of fact; the fact was that only the smaller sum was due, and consequently he is now entitled to recover the 1000*l.* sued for.

KEATING, J., concurred.

MELLOR. J. I am of the same opinion. I entirely agree that this money is recoverable, unless the plaintiff paid it through his own default or voluntarily with a full knowledge of the facts. It is contended that by meeting his acceptance he really did so pay it; but I cannot assent to that view of the case. He had given the acceptance before the discovery was made, and he was, I think, bound to meet it, considering that he was at all events partially liable upon it, and that his father's credit, as well as his own, was involved. It does not seem to me in any sense a voluntary payment. With regard to the allegation that the plaintiff was guilty of carelessness and negligence in not discovering the mistake when he first investigated the accounts, I do not think it made out. Being, therefore, not guilty of any negligence, and not having made the payment voluntarily, I think he is entitled to succeed in this action.

MONTAGUE SMITH, J. I am of the same opinion. The main question is, whether the partnership account ought to be credited with two sums of 500*l.* which were paid by Woolnough under the circumstances mentioned in the case. I think the partnership account ought to be so credited. If the two sums were paid irrevocably as payment of the partnership debt, then of course so much of the partnership debt was wiped out, and there would be a good defence by both the partners, and of course by one of them, at law; but if that was not an irrevocable payment, the two sums were received by the defendants with the full knowledge that those moneys were partnership moneys, and they received them from one partner in payment of his separate debt. Having that knowledge, it seems to me that they cannot retain that money for the separate debt when it turns out in point of fact that Woolnough had no authority whatever from his partner so to appropriate the money. When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he his going beyond the scope of his agency; and express authority, therefore, is necessary from the other partner to warrant that payment. Now I quite agree with what has been stated, that there may be conduct on the part of the other partner which may be a substitute for express authority; conduct which may lead persons dealing with the other partner to suppose that he had that authority given to him, but in this case there is no authority whatever; on the contrary, express authority is negatived, and there is no evidence of any conduct on the part of the plaintiff by reason of which the defendants may reasonably have supposed he had given such authority. That being so, I have no doubt that if these accounts were taken in a court of equity the defendants would be compelled to place those two sums of 500*l.* to the credit of the partnership account. In ignorance of that state of things the plaintiff has paid the two sums out of his own moneys, which he would not have paid if he had known the true state of things. In the view I take of the matter, therefore, he is entitled to recover them back. I entirely agree with the rest of the Court, for the reasons given, that the fact of taking the bill up after knowledge of the circumstances does not make the money he so paid to take it up a voluntary payment. At the time he gave the bill, which I conceive to be the material point of time, he was in ignorance of the facts, and his having come to the knowledge of them before the bill became due does not make the taking it up a voluntary payment.

LUSH, J. I am of the same opinion. Assuming this 1000*l.* to be a payment originally by Woolnough to his own private account, then as the defendants knew the money was partnership money, I think that, although they believed that Woolnough had the authority of his partner to appropriate that money to his own account, they cannot justify keeping it to that account, there being no authority in fact. The mistaken belief that the one partner had that authority cannot prejudice the right of the other, if the other did nothing to induce such a belief. As already observed, the defendants, knowing that it was partnership money, knew that in appropriating that money to his private account, Woolnough was exceeding the authority belonging to him as a partner; and therefore they took the money, under the circumstances, at their peril; and the fact being that the one partner had not the authority of the other, they cannot keep it. Then it is alleged that there is a difficulty in the way; that if an action had been brought for this balance the action must have been brought against both the partners, and inasmuch as the defendant Kendal in that action would have been bound by the act of Woolnough, he could not have proved a joint payment of a joint account. For aught I know, that may be true; but then I think it clear if Kendal could not have relieved himself at law, he might in equity; for there he might have compelled the defendants to rectify the account, and so have relieved himself from the obligation.

Now, he gave the bill in question, which he ultimately paid, in ignorance of the real facts of the case; facts the knowledge of which would have enabled him, either at law or equity, to relieve himself of the obligation to pay. And, according to all the authorities, if the 1000*l.* had been originally paid in money, instead of being paid by means of a bill, the plaintiff would have been entitled to recover it back. Is he the less entitled because he gave a bill, and because the knowledge of the fact comes to him before the bill comes due? It cannot be said that the taking up of an acceptance by a mercantile man can be deemed a voluntary payment; but at all events, to make out such an argument as that, it ought to be clearly and distinctly stated as a fact, that the bill, at the time he took it up, was not in the hands of a third party. We are left entirely in the dark on this point. I should rather infer, if I were driven to draw an inference, that the bill had been discounted, and was in the hands of some person for value; at all events, it is not necessary one way or the other to raise such a question as that. Therefore I agree with the rest of the Court in thinking that the judgment ought to be reversed.

BRETT, J., concurred.

Judgment reversed.

Attorneys for plaintiff: *Reed, Phelps, & Sidgwick.*
Attorneys for defendants: *Johnson & Weatheralls.*

DUNCAN AND ANOTHER v. HILL.

May 1.

Stock Exchange Usages—Principal and Agent—Principal's Liability to Broker for Broker's Default.

7 Ch. 747
8 Ch. 925,

The plaintiffs, brokers on the London Stock Exchange, were instructed by the defendant, who was not a member of the house, to buy certain shares in various public undertakings for him for the account of the 15th of July, 1870. Subsequently he told the plaintiffs to carry over the shares to the account of the 29th of July. This was done, and the defendant was furnished with an account shewing him to be liable to a difference of 1688*l.* 19*s.* On the 18th of July the plaintiffs were declared defaulters, and, in accordance with the rules of the Stock Exchange, all their transactions were closed, and accounts made up at the prices current on that day, without the knowledge of or any reference to the defendant. The result was that there was a difference against the defendant of 6013*l.* 13*s.* 5*d.* In an action to recover this sum:—

Held, that the rules of the Stock Exchange, regulating the mode of dealing with defaulters, bound the defendant; that the plaintiffs, though themselves the defaulters, might take advantage of those rules, and that therefore they were entitled to recover.

Revd in Ex Ch L.R. 8 Ex. 242

DECLARATION. 1st count: for money paid, interest, work done, commission, and money due on accounts stated.

2nd count: that the plaintiffs, as the defendant's brokers, and upon his retainer, contracted with divers persons on his behalf for the purchase and sale, by the plaintiffs, of certain stocks and shares on the terms that the defendant would indemnify the plaintiffs in respect of such contracts; that all conditions were fulfilled, &c., yet the defendant did not indemnify the plaintiffs, whereby they were required to pay, and have paid, divers sums of money for damages for the non-performance by the defendant of the said contracts.

3rd count: that the plaintiffs, as the defendant's brokers and upon his retainer, contracted with divers persons for the purchase and sale of certain stocks and shares, upon the terms that such contracts should be performed or settled by the defendant according to the usage of the London Stock Exchange; that all conditions were fulfilled, &c., yet the said contracts have not been performed or settled as agreed, whereby the plaintiffs were forced to settle and close the said contracts by sales and purchases of the said stocks and shares at a loss to the plaintiffs.

Pleas: 1. To 1st count: never indebted. 2. To 2nd count: traverse of agreement to indemnify. 3. To same: that the plaintiffs did not, as the defendant's brokers or upon his retainer, contract with divers or any persons, on his behalf, for the purchase or sale by the plaintiffs of stocks or shares. 4. To same: that the plaintiffs were not damnified. 5. To 3rd count: traverse of agreement that the contracts should be performed or settled, according to the usage of the London Stock Exchange. 6. To same: a similar plea to the 3rd. 7. To same: traverse of the breach. 8. To 2nd and 3rd counts: that after the making of the alleged agreements, and before breach, it was agreed between the plaintiffs and the defendant that the said contracts should be closed and settled by the plaintiffs, as his brokers, on a day then agreed on for reward to the plaintiffs, and on the terms that the defendant should indemnify them against any loss arising from the closing and settlement of the contracts on that day; and the plaintiffs, before breach, accepted the said agreement in full satisfaction and discharge, and thereby released and discharged the defendant from further performance of the agreements in the declaration alleged.

Replication, joining issue on all the pleas, and to the 8th plea a new assignment for other breaches. The defendant pleaded to the new assignment similar defences to those pleaded to the 2nd and 3rd counts of the declaration, except the 8th plea. Issue.

At the trial before Kelly, C.B., at the London sittings after Michaelmas Term, 1870, the following facts were proved:—

The plaintiffs were, at the time of the occurrences which gave rise to this action, brokers on the London Stock Exchange; the

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defendant is a gentleman resident in London. He is not a member of the Stock Exchange. In June, 1869, he commenced dealing in stocks and shares through the plaintiff, Mr. Duncan, as his broker, and went on doing so up to the month of July, 1870. On the 1st of July Mr. Duncan was joined in business by the other plaintiff, Mr. Wreford. The defendant continued to employ them as his brokers in the same manner as he had hitherto employed Mr. Duncan, and they bought for him, by his instructions, a large quantity of stocks and shares in various public undertakings for the account of the 15th of July. The defendant not wishing to take up these stocks and shares on the 15th of July, directed the plaintiffs, on the 13th of July, to carry them over to the next account day, the 29th of July. This was done, and he was furnished by them with an account shewing him to be liable to pay a difference of 1688*l.* 19*s.* The plaintiffs were declared defaulters on the 18th of July, and, according to the rules of the Stock Exchange (1), all their transactions were peremptorily closed, and their accounts made up by the official assignees at the prices current on that day, without any communication with the principals. The result was that the difference against the defendant was 6013*l.* 13*s.* 5*d.*, which the plaintiffs now sought to recover on an alleged contract of indemnity. The learned judge thought that the whole of the usages and practice of the Stock Exchange was imported into the contract between the parties, and accordingly directed a verdict for the plaintiffs for this amount, with leave to

8 Ex 243.

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(1) The following are the rules under which the committee of the Stock Exchange act in the case of a broker becoming a defaulter:—

"142. A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee.

"167. Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings, to enter into a strict examination of every account, to investigate any bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the direction of the majority of the creditors present.

"169. The official assignees shall publicly fix the prices at which a defaulter's transactions shall be closed, such prices to be those current in the market immediately before the declaration; but in the event of a dispute as to the prices named, they shall be fixed by two members of the committee."

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the defendant to move to enter a nonsuit, or to reduce the damages to 1688*l.* 9*s.* It was arranged that the defendant should at once pay this latter sum to the plaintiffs, who had paid it for him in the first instance, on the 15th of July.

In Hilary Term last a rule was obtained, calling on the plaintiffs to shew cause why the verdict should not be set aside and a nonsuit entered, or why the damages should not be reduced to 1688*l.* 19*s.* (paid to the plaintiffs), on the ground that the further damages claimed were not damages recoverable against the defendant, and that in that respect the plaintiffs were not legally damnified, or entitled to indemnification, or otherwise to recover in the action.

April 17, 27, 28. *Sir J. D. Coleridge, S.G., Powell, Q.C.,* and *Day,* shewed cause, and contended that the defendant was bound by all the usages of the Stock Exchange, and that the difference against him, having been declared and estimated by the assignees in the ordinary way, must be paid by him: *Grissell* v. *Bristowe* (1).

Sir J. B. Karslake, Q.C., J. Brown, Q.C., and *J. O. Griffits,* in support of the rule. It must be admitted that the usages of the Stock Exchange, which govern the ordinary transactions of sale and purchase of stocks and shares, are incorporated into contracts made with persons who were not members of the Exchange; but a defaulting broker has no right to avail himself of a usage regulating the mode of dealing with defaulters in order to fix his principal with an additional liability. The usage relied on by the plaintiffs is not in any way connected with a bargain for the sale or purchase of shares. It is as to a matter wholly collateral to the contract. Moreover the sale was behind the defendant's back; he neither knew nor could know anything about it.

[They cited Taylor on Evidence (3rd ed.), p. 952, s. 1075; Addison on Contracts (6th ed.), p. 935; *Sutton* v. *Tatham* (2); *Pollock* v. *Stables* (3); *Mollett* v. *Robinson* (4); *Maxted* v. *Paine* (2nd action) (5); *Hodgkinson* v. *Kelly* (6).]

Cur. adv. vult.

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(1) Law Rep. 3 C. P. 112; Law Rep. 4 C. P. 36.

(2) 10 A. & E. 27.

(3) 12 Q. B. 765.

(4) Law Rep. 5 C. P. 646.

(5) Law Rep. 4 Ex. 203; ante, p. 132.

(6) Law Rep. 6 Eq. 496.

May 1. Kelly, C.B. The question in this case, which we are called upon to determine, and which lies at the root of all cases of contracts entered into upon the Stock Exchange, is whether any one of the public who enters into such a contract through his broker, who must necessarily be a member of the Stock Exchange, impliedly agrees that all rules and customs of the Stock Exchange affecting the rights and liabilities of all parties to those contracts, or who become interested in them after they have been made, shall be imported into and become part of the contract, and be binding upon himself, the principal, as well as his agent the broker; and that depends upon whether it is a reasonable condition and consistent with justice, and with the principles of the law of England, that these rules and customs shall be so imported into the contract, and that an agreement to that effect is founded upon a sufficient consideration moving to the individual in question from all the other parties to the contract, and involving benefits and advantages to the party contracting, which make it reasonable and just.

The plaintiffs are brokers upon the Stock Exchange, and the defendant a merchant, who, for about eighteen months before the time of the contract in question, had effected a number of transactions to a very large amount in the purchase and sale of shares through the plaintiffs upon the Stock Exchange. Upon many of these he had realized large profits, upon others he sustained considerable losses; and on or about the 13th of June, 1870, he instructed the plaintiffs to purchase for him a considerable number of shares in various public undertakings at the market price of the day, and this contract was carried over at his request from time to time, and at length to the account-day, the 15th of July. On the 13th of July, when it was necessary either to carry on the contract to the next account-day, the 29th of July, or to settle the transaction for the 15th, by paying the difference between the price agreed upon for the shares and the market price of the shares on that day, the 15th, the defendant being unable to find the amount, which on that day would have been 1688*l.* 19*s.*, instructed the plaintiffs to carry on the contract from the 15th to the 29th. On the 15th, the defendant being unprepared with the money, it was advanced and paid by the plaintiffs. On the 18th, the plaintiffs, by

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reason of the failure of many for whom they had effected contracts, and, among others, of the defendant, to make good their payments, became unable to meet their engagements, and were declared defaulters under rule 142 of the Stock Exchange. On that day, official assignees having been appointed under rule 167, they proceeded to close the plaintiffs' transactions, and, among others, the contract in question made on behalf of the defendant. The sum payable in order to settle the transaction, and in effect to relieve the plaintiffs and the defendant from the contract, amounted to 6013*l.* 13*s.* 5*d.*, and to recover this sum from the defendant the action was brought. To refer to the figures: the loss on the 13th was the before-mentioned sum of 1688*l.* 19*s.*, and upon the 15th, for carrying over to the 29th, the sum of 4,037*l.* 8*s.* 5*d.*; and upon the 18th, as before stated, 6013*l.* 13*s.* 5*d.*; and if the contract had not been closed on that day, but had been, as agreed upon, carried over to the 29th, the loss would have amounted to 13,404*l.* 18*s.* 9*d.* This transaction, supposing the defendant and the plaintiffs to be identified, and the defendant to have indemnified the plaintiffs by paying the money upon the close of the transaction, on the 18th of July, the day of their failure, would have been simply this:—the defendant instructed the plaintiffs, his brokers, to purchase, and the plaintiffs contracted to purchase accordingly the shares in question at the market price of the day; and when the first account-day arrived, and when the defendant was bound to find the money, the agreed price of the shares, and was unable to do so, the settlement was at his request carried over or postponed from time to time, until at length the 29th of July was the day appointed when he would be bound either to pay the whole amount of the purchase-money agreed upon, and take up and receive the shares, or to ascertain the price of the day, and if it should be less than the price contracted for, to cancel the contract and pay to the seller the difference between that sum and the value of the shares at the market price of the day. But upon the failure of the brokers, and the obligation upon them attaching to close the contract upon the 18th, it became necessary for him either to take up the shares and pay the whole price agreed upon, or to cancel the contract and pay the difference between that sum and the value of the shares at the market price of the day.

Upon these facts the question for the Court to determine, as in *Grissell* v. *Bristowe* (1), *Maxted* v. *Paine* (2nd action) (2), and many other cases, is whether one of the public who employs a broker or a jobber to enter into a contract on his behalf on the Stock Exchange, must not be held to have entered into the contract subject to and incorporating into it all the reasonable rules and usages prevailing upon the Stock Exchange, and which are absolutely binding upon their own members.

If it be not so, it is difficult to understand how any one of these contracts can be said to have been entered into at all; for at every step of the transaction, from the original making of the contract to its complete and final performance, something is done not expressly specified or mentioned, or referred to, by any of the parties at the time that it is made, which is in fact done by reason and in pursuance of these rules and usages, and which could not or would not be done but for their existence and their effect and operation upon the performance of the contracts.

Thus, in this case, if the defendant were to insist that he had simply entered into a contract through his broker with the jobber, for the purchase of the shares in question, to be delivered and paid for on the 15th of July, and on that day were to pay the money into the hands of his broker and demand the shares; the jobber may in the meantime, on the name day, have given in the name of another seller, who had not been objected to, and had become insolvent and was unable to deliver the shares. The defendant, the purchaser, demands the shares of the jobber. He answers that his contract was to deliver the shares or to name another as the seller; and that he has named another accordingly, and is discharged. And this is true; for the contract into which he had entered is subject to the rules of the Stock Exchange; and by those rules he had the alternative of naming another seller. The result is, that unless the purchaser's contract was also subject to those rules, no contract has been made; for the defendant's contract without the rules is absolute, and the jobber's being according to the rules is conditional, and so there would be no contract at all. It is necessary, therefore, to consider whether it is one of the conditions of the contract binding upon the principal that he shall identify himself with his agent the broker, and take upon himself all his duties and liabilities in conformity with these rules and usages; and therefore whether, when the nature of all these transactions is considered, there is a good consideration moving to the principal and binding upon him, for the incurring of such an obligation.

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(1) Law Rep. 3 C. P. 112; Law Rep. 4 C. P. 36.

(2) Law Rep. 4 Ex. 203; ante, p. 132.

To refer, in the first place, to the authorities, the principle of the decision in *Grissell* v. *Bristowe* (1) is, that the usages of the Stock Exchange, if not unreasonable, are imported and incorporated into all contracts entered into by any of the public for the purchase or sale of stocks or shares upon the Stock Exchange, and, through the medium of brokers or jobbers, members of the Stock Exchange and themselves bound by these usages. There the plaintiff had entered into a contract for the sale of certain shares in Overend & Gurneys upon the Stock Exchange, through the medium of a broker, with the defendant, a jobber, both members of the Stock Exchange, the sale and purchase to be carried into effect and completed on the account-day, the 15th of May, 1866. Before that day, and in due time, according to the rules of the Stock Exchange, the defendant gave in the names of certain other persons not parties to the contract which had been made by the plaintiff, but who were to be the ultimate purchasers of the shares the plaintiff had contracted to sell. These persons were not objected to within the time allowed for that purpose by the rules of the Stock Exchange; and such purchasers, though the plaintiff had done all that in him lay to complete the performance of his part of the contract, failed to register the transfer of the shares, or to pay the amount of some subsequent calls, which the plaintiff thereupon became liable to pay. He then brought his action against the defendant for non-performance of the contract to indemnify; and it was held that, under the above circumstances, the defendant having, in pursuance of the rules of the Stock Exchange, given in the names of the ultimate purchasers, to which no objection within due time had been made, had thus transferred the liabilities of a purchaser from himself to the persons so named, had ceased to be a party to the contract, and so was not liable to the action.

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(1) Law Rep. 3 C. P. 112; Law Rep. 4 C. P. 36.

Here, then, a term or condition was held to have been imported into the contract, and to form part of it, to the effect that if the purchaser should, within a certain time, deliver in the names of another person or persons to be substituted for himself as the purchasers of the shares, if no objection be made to them by the seller within a given time, they shall be deemed the purchasers under the contract, and the defendant, the original actual purchaser, discharged. No such condition was ever expressly mentioned or alluded to at the time when the plaintiff instructed his broker to enter into the contract. It was wholly inconsistent with all that the contract would primâ facie import, inasmuch as it enabled the original contracting party, the seller, to discharge himself from the performance of the contract altogether by substituting another person or persons as contracting parties who might be, and actually proved to be, wholly insolvent.

Several other cases have since been decided in accordance with the judgment of the Exchequer Chamber in *Grissell* v. *Bristowe.* (1) Among them is the case of *Maxted* v. *Paine* (2nd action) (2), affirmed in error in the Exchequer Chamber. (3) There upon a contract for the sale of shares originally made between a broker and a jobber, but transferred by the jobber to an ultimate purchaser by giving in the name Goss on the name day, who was not objected to within the ten days allowed for that purpose by the usage of the Stock Exchange, it appeared that Goss was not the actual purchaser, and was a man wholly without means, who had consented to the use of his name for a small pecuniary consideration, and who was therefore unable to perform the contract, or to indemnify the plaintiff against calls that had been subsequently made. But these circumstances were unknown to the jobber, who had originally entered into the contract of purchase, and so there was no fraud. And it was held that the usage, although its effect was to substitute an insolvent for a solvent purchaser, formed part of the contract, and was binding upon all parties; that Goss was alone liable as the ultimate purchaser; and that the defendant was discharged. It is remarkable that the judges of the Court of Common Pleas who originally decided the case of *Grissell* v. *Bristowe* (1), including Byles, J., who pronounced an admirable judgment, dissenting from that of the other members of the Court, assumed that by the rules of the Stock Exchange, the jobber having given in the name of another purchaser on the name day, the seller or broker had no power to object to him, and that the liability of the jobber was at an end. In the case, however, last referred to of *Maxted* v. *Paine* (2nd action) (2), this point, in consequence of the insolvency of the nominee, came prominently before the Court, and a power in the seller to object to the nominee appearing to be part of the custom, it ceased to be unreasonable, and was therefore properly treated as incorporated into and forming part of the contract.

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(1) Law Rep. 3 C. P. 112; Law Rep. 4 C. P. 36.

(2) Law Rep. 4 Ex. 203.

(3) Ante, p. 132.

We have now to consider whether the custom and the rules in relation to defaulters, and their operation upon the rights and liabilities of the parties, are also to be held reasonable, and so incorporated into and forming part of the contract in this case. The rules which govern the question are, first, rule 49: "That the Stock Exchange does not recognize in its dealings any other parties than its own members; and that every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the Stock Exchange." It follows from this rule that if a contract be made upon and between members of the Stock Exchange, it must of necessity, with all its incidents and consequences, be carried into effect from beginning to end in conformity to those usages, or it must altogether fall to the ground, and never be carried into effect at all. It is difficult, therefore, to see how any one can maintain an action upon such a contract without admitting the full operation upon it of the rules and usages of the Stock Exchange, under which alone it can come into existence or be carried into effect.

We must next consider, then, what the usage is which is sought to be incorporated into the contract upon which this action is brought. For this purpose we must look to the rules 142, 167, 168, 169, the effect of which is, that upon a member of the Stock Exchange, as the plaintiffs are in this case, becoming unable to meet his engagements, he may be publicly declared a defaulter, and official assignees may be appointed to investigate and wind up the contracts into which he has entered, and to close his transactions at the price current in the market on the day before he shall have been declared a defaulter. Applying these rules to the present case, upon the plaintiffs becoming defaulters, upon the 11th of July their assignees were required to close their transactions, including, among others, the contract in respect of which this action is brought, and, in other words, to settle the contract by the purchaser paying to the seller the price, or as much as should remain unpaid of the price, of the shares contracted for, and taking up the shares, or by paying the difference between that price and the market price of the day, and so putting an end to the contract. The plaintiffs in this case being the purchasers, they are called on to pay the one or the other of these sums, the difference, in case of the contract being brought to an end, being 6013*l.* 13*s.* 5*d.* This sum therefore became payable on the 18th of July under this contract, and, according to these rules, by the purchaser to the seller. The principal and the real purchaser was the defendant. The actual purchasers were the plaintiffs, and this sum being thus payable by them according to the rules of the Stock Exchange, the simple question in the case is, whether upon this entire transaction there is a contract in law on the part of the defendant, the real principal, as purchaser, to identify himself with the plaintiffs, his agents, and take upon himself and satisfy the liability to which their failure had subjected him; in other words, to complete the performance of the contract which he had entered into according and in conformity to the foregoing rules. Nothing can be more clear than that, if such be not the implied contract between the plaintiffs as the agents, and the defendant as the principal, the contract must fall to the ground altogether; for the actual makers of the contract, the brokers and the jobber, having entered into it as a contract according to and incorporating the rules, and one of these rules being, that upon the failure of the brokers the contract must be settled and brought to an end; then as that can be done only by the payment of the difference in question, if the defendant, the principal, severs himself from his agents, the brokers, and refuses thus to carry the contract into effect according to the rules, he must renounce it altogether; and if the shares had risen in value to any amount, he could not have enforced the contract, and obtained the benefit of the rise. By the rules of the Stock Exchange the broker is the only party recognized, and he, as purchaser, is liable to the jobber, as seller, for the price of the shares purchased and sold; and it would be absurd to contend that whenever the price becomes payable the principal, the defendant in this case, is not bound to enable his agent to perform his contract by finding and paying over, through him or otherwise, the amount due to the seller, and yet that if the shares had risen in value he could have enforced the performance of the contract either by insisting upon the delivery and transfer to himself of the shares, or upon the payment to him of the difference according to the price of the day. It is, in truth, but one of the many incidents to a contract of this nature, that in case the broker shall become a defaulter he is liable to pay immediately the price of the shares, and so to bring the contract and the performance of it to a conclusion. And although in this particular case the principal is, no doubt, subjected to a disadvantage, it is more than countervailed by the many advantages resulting to him from his being enabled by means of these rules to enter into a contract at any moment for the purchase or sale of any quantity of stock or shares at the market price of the day.

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(1) Law Rep. 3 C. P. 112; Law Rep. 4 C. P. 36.

(2) Law Rep. 4 Ex. 203; ante, p. 132.

The great and important question arising in all these cases, and next to be considered, is, whether upon contracts thus made upon the Stock Exchange, between its members and according to its rules and usages, it is reasonable that the principal should be identified with the agent or broker, and bound and liable, as the agent himself is, to the performance of the contract made in all its incidents and with all its consequences.

To enable us to consider this question, we must consider what the nature of most of these contracts is, and what are the benefits and advantages accruing to the public and constituting the consideration in respect of which they take upon themselves all the risks and liabilities of their agents, the members of the Stock Exchange, arising out of or connected with these contracts. We must, in the first place, remember that the broker and the jobber, between whom the contract is actually made upon the Stock Exchange, become themselves personally liable for its performance to each other, and to all who, under the operation of the rules of the Stock Exchange, have been or may become parties to or interested in the contract.

And but for these two persons, the broker and the jobber, taking upon themselves these liabilities, no one of the public could enter into any of these contracts at all. For how would any one, desirous of investing say a sum of £4500 in American stock on the 15th of July in any year, find some other person ready to sell and transfer to him, at that very time, that exact amount of stock at the market price of the day? The principal then receives, as consideration for the liability which he incurs, the convenience that a purchase or sale may be effected of the desired amount and at the desired time, which he would find it impossible to make except through the medium of a broker, while the broker could not effect the contract at all but by agreeing that it should be taken to be made in conformity to the rules and usages of the Stock Exchange, and by making himself personally liable for the performance of it, according to those rules and usages.

The disadvantages, therefore, to which the public may occasionally become liable upon contracts of this nature are slight, indeed, compared with the great benefits which they derive from being enabled to enter into contracts or sales for any amount, or any description of stocks or shares which they may desire to buy or sell, and at the precise time at which they may wish to effect such transactions. We think, therefore, upon the authorities referred to and upon reason and principle, that in this case, and in all such cases, there is a good and sufficient consideration for the liabilities which the principal may incur, in this that the agent or broker takes upon himself a personal liability to perform the contract, while the principal becomes entitled to all the benefits and advantages which can result from its performance.

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Upon these grounds I am of opinion that the plaintiffs are entitled to the judgment of the Court.

CHANNELL and PIGOTT, BB., concurred.

Rule discharged. (1)

Attorneys for plaintiffs: *Whites, Renard, & Floyd.*
Attorney for defendant: *Oehme.*

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8 Ex 243.

(1) In *Duncan and Another* v. *Beeson*, which was argued on the 1st of May, 1871, the facts were similar to those in the preceding case, with the addition that Beeson had already paid the plaintiffs, on the 15th of July, the difference to which he was liable on the carrying over of the shares.

THE COURT (Kelly, C.B., Channell and Pigott, BB.) did not consider this circumstance affected the plaintiffs' right to recover.

Powell, Q.C., and *Murphy*, shewed cause.

J. Brown, Q.C. (*Philbrick* with him), supported the rule.

Revd in Ex Ch. LR 8 Ex 242

END OF EASTER TERM, 1871.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXIV VICTORIA.

ROBINSON *v.* DAVISON.

1871
May 26.

Conditional Contract—Contract to do an Act requiring Personal Skill—Illness—Excuse from Performance.

9 QB 464
1 QBD 186
261
14 ChD 606

The plaintiff contracted with defendant's wife (as her husband's agent), that she should play the piano at a concert to be given by the plaintiff on a specified day. She was, on the day in question, unable to perform through illness. The contract contained no express term as to what was to be done in case of her being too ill to perform. In an action against the defendant for breach of this contract:—

Held, that his wife's illness and consequent incapacity excused him, inasmuch as the contract was in its nature not absolute, but conditional upon her being well enough to perform.

DECLARATION: That the plaintiff was a professor and giver of musical entertainments, and thereupon, in consideration of a certain fee to be paid by the plaintiff to the defendant, the defendant promised the plaintiff that Arabella Davison, the wife of the defendant, should perform at a certain musical entertainment to be given by the plaintiff, and would procure a vocalist to sing thereat, and provide a fit pianoforte for the purpose of the entertainment, and all conditions were performed, &c.; yet Arabella Davison did not nor would perform, and the defendant did not procure a vocalist or piano, whereby the plaintiff was unable to give the entertainment, and suffered loss in consequence.

Plea (inter alia) 9: That the promise alleged was made subject to the term and condition that, if Arabella Davison should be unable to perform at the said musical entertainment in consequence of illness, the defendant should be exonerated and discharged from fulfilling his promise; and that Arabella Davison was unable to perform in consequence of illness. Issue.

At the trial, before Brett, J., at the last Lincolnshire Spring Assizes, the record was by leave amended by the addition of a count alleging that the contract between the plaintiff and defendant required Mrs. Davison, in case of disability to perform through illness, to give notice thereof to the plaintiff within a reasonable time after she knew that she would be unable to perform; that she was disabled through illness, yet failed to give notice within a reasonable time, whereby, &c.

Pleas to added count: 1. Denying the alleged term as to giving notice; and 2. Alleging performance of it. Issue.

The plaintiff is a professor of music and giver of musical entertainments at Gainsborough, in Lincolnshire, and the defendant is the husband of an eminent pianist known professionally as Miss Arabella Goddard. In December, 1870, the plaintiff entered into an engagement with Mrs. Davison, that she should perform on the piano at a concert at Brigg, in the same county, on the evening of the 14th of January, 1871, for an agreed fee, Mrs. Davison to provide a piano and a vocalist upon the occasion. Nothing was expressly said as to what was to be done in case Mrs. Davison should be ill on the day in question, or in any way incapacitated from performing. The defendant's responsibility in respect of his wife's contract was not disputed. On the morning of the 14th of January the plaintiff received a letter by post from Mrs. Davison, stating that she was too ill to attend at the concert. A medical certificate was enclosed. Upon receipt of this communication the plaintiff despatched messengers to the people in the neighbourhood who had taken tickets, to prevent their coming, and took all other steps he could to give notice to the public that the concert was unavoidably postponed. All the money he had taken was, of course, returned. If Mrs. Davison had telegraphed the fact of her illness on the 13th of January instead of writing, the plaintiff could have put off the concert at a less expense than that which was actually incurred.

The plaintiff gave evidence at the trial that he had lost about 70*l.* by the postponement of the concert. With regard to the added count, he stated his expenses for messengers, &c., to be 2*l.* 13*s.* 9*d.* beyond what he would have had to spend had he had earlier notice. He further stated that, owing to the notice being so late, he lost the opportunity of providing an efficient substitute for Mrs. Davison. Had he received it before, he could, he said, have done so, and have given the concert. Allowing the same fee to a substitute as he had contracted to pay Mrs. Davison, he put his loss at about 40*l.*

On the part of the defendant, evidence was given that Mrs. Davison was so ill that she could not have fulfilled her engagement without danger to her life; and the plaintiff did not, eventually, dispute the fact. The learned judge directed the jury that the contract was subject to the implied condition that the defendant was excused if his wife was so ill as to make it unreasonable, on the ground of illness, that she should perform her engagement; and as to the added count, that if she was disabled by illness, or was so ill as to be unable to keep her engagement, she was bound to give the plaintiff notice within a reasonable time; and that, if they thought that reasonable notice had not been given, the plaintiff was entitled to a verdict either for his out-of-pocket expenses or for his whole loss, less the fee he would have had to pay a substitute, according as the jury might think him right or wrong in supposing he could have obtained an efficient substitute, had the fact of Mrs. Davison's illness been telegraphed to him on the 13th. The jury found a verdict for the defendant on the issue raised by the ninth plea to the original count in the declaration, and for the plaintiff, upon the issues on the pleas to the added count, for 2*l.* 13*s.* 9*d.* The judge refused to certify for costs.

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ROBINSON v. DAVISON.

In Easter term last a rule was obtained calling on the defendant to shew cause why a new trial should not be had, on the ground that the judge misdirected the jury in telling them that the contract was subject to the implied condition that the defendant should be excused if Mrs. Davison was so ill as to make it unreasonable, on the ground of illness, that she should perform; also on the ground that the damages were inadequate; also calling on the defendant to shew cause why he should not pay costs under 30 & 31 Vict. c. 142, s. 5. (1)

O'Brien, Serjt., and *Wills,* shewed cause. The illness and disability of the defendant's wife excused the defendant from performing this contract. The engagement to play the piano was one which she and she only could fulfil. It was a personal service, from which illness exonerated her. Suppose she had died; clearly no action for a breach could have been maintained, and incapacity caused by no default of her own equally excuses. The contract is based upon an implied understanding that the artist shall be physically capable of performing. The performer's health is the basis of the contract; and it is fallacious to say that, because no express term exonerating from the duty to perform in case of illness was inserted in the contract, therefore it is an absolute contract. It really is a conditional one: *Sparrow* v. *Sowgate* (2); *Williams* v. *Lloyd* (3); *Taylor* v. *Caldwell* (4); *Boast* v. *Firth* (5). The case of *Paradine* v. *Jane* (6) has no application here; the defendant there contracted to pay rent in all events. Again, in *Hall* v. *Wright* (7), although a majority of the judges held that it was no answer to a declaration alleging an unconditional promise to marry, that the result of marrying would be dangerous to the defendant's life, the decision is based partly on considerations connected with the exceptional nature of the marriage contract, and partly on the pleadings in the case. The decision of the dissentient judges, and the reasoning of the majority, is in favour of the defendant in this case.

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(1) It was agreed that the learned judge in effect had ruled that the defendant was excused only by the absolute incapacity of his wife to play, although the word "unreasonable" had been used in one passage of the summing-up.

(2) Sir W. Jones, 29.

(3) Sir W. Jones, 179.

(4) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(5) Law Rep. 4 C. P. 1.

(6) Aleyn, 26.

(7) E. B. & E. 746; 29 L. J. (Q.B.) 43.

6 Jur. N.S. 192.

With regard to the added count, the plaintiff was not entitled to a verdict, for no notice was necessary at all. Or assuming that there was an implied condition that notice of incapacity should be given, it was fulfilled. At all events the damages for its non-fulfilment are not inadequate. As to the rule for costs, the plaintiff failed on the main question, and could not have got even the small verdict he did without an amendment, which was of doubtful propriety, as it raised a question which the parties had not intended to try: *Wilkin* v. *Reed* (1). The mere fact of the questions to be tried involving legal difficulties is no reason for granting costs, where the amount recovered is insignificant: *Craven* v. *Smith* (2); *Gray* v. *West* (3).

Seymour, Q.C., and *Cave*, in support of the rule. As to the costs, a rule for them should be granted, on the ground of the difficulty of the legal questions connected with the case, which could not have been satisfactorily settled in the county court. [Costs were also asked for on other grounds brought before the Court on affidavits, to which, however, it is unnecessary to refer.] As to the two chief questions—first, if there was an implied condition that illness excused Mrs. Davison from performance, it is also a condition that notice within a reasonable time should be given to the plaintiff. Here the notice was, according to the finding of the jury, too late to be of any use, and the damages given are inadequate. Secondly, the defendant is entitled to a new trial on the ground of misdirection. He chose to make an express contract for his wife that she should do a certain thing on a specified day, and if illness prevented her he must pay damages. He might have made a conditional contract if he had chosen, but having bound himself absolutely, the law will not imply the condition. There is a difference between an obligation imposed on a man by law, and one imposed by his own act. In the latter case, however unreasonable the contract may be, he must perform it, or pay damages for non-performance: *Paradine*

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(1) 15 C. B. 192; 23 L. J. (C.P.) 193.
(2) Law Rep. 4 Ex. 146.
(3) Law Rep. 4 Q. B. 175.

v. *Jane* (1); *Stubbs* v. *Holywell Ry. Co.* (2); *Farrow* v. *Wilson* (3); Benjamin on the Contract of Sale, p. 424; *Lord Clifford* v. *Watts* (4). It was proved, indeed, that Mrs. Davison could not have attended the concert without danger to her life; but in *Hall* v. *Wright* (5) the defendant pleaded he could not marry without danger to his life, yet he was held not to be excused. That case is a direct authority in favour of the plaintiff here.

Kelly, C.B. The main question in this case is one of great importance, and deserves attentive consideration. It appears that the defendant's wife, an eminent pianist, was under a contract to appear at a concert given by the plaintiff at Brigg, on the 14th of January, 1871. She was prevented by illness from fulfilling the engagement, and it is contended on her behalf that her illness and consequent incapacity to perform constitute a lawful excuse for non-performance of the contract. I am of opinion that this contention is well founded. This was a contract for the performance of a service which could alone be undertaken by the defendant's wife. She could not depute it to any one else, as it depended on her own personal skill; and the rule which governs such cases was, I think, correctly laid down by my learned predecessor Pollock, C.B., in *Hall* v. *Wright* (5) who says (6): "Now it must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." The learned Chief Baron was, it is true, one of the dissentient judges in that case, but the principle he enunciated appears to have been one to which the majority assented; and it clearly applies to the present case. Here an artist contracted to play the piano at a concert; but if he or she should be unable by reason of illness or other cause to perform, the performance of the contract is, upon the principle laid down, excused. The law is also well stated in *Taylor* v. *Caldwell* (1), by Blackburn, J. There the defendant had contracted to supply the plaintiff with a room in a music-hall on a particular occasion. Before that occasion arrived the hall was burnt down, and the defendant was held not to be liable on his contract. The existence of the room was the foundation on which both parties proceeded, and the fire, which happened through the default of neither, excused both. The learned judge says (2): "There are authorities which we think establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." I think this principle is directly applicable here; the parties must have known their contract could not be fulfilled unless the defendant's wife was in a state of health to attend and play at the concert on the day named.

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(1) Aleyn, 26.

(2) Law Rep. 2 Ex. 311.

(3) Law Rep. 4 C. P. 744.

(4) Law Rep. 5 C. P. 577.

(5) E. B. & E. 746; 29 L. J. (Q.B.) 43. 6 Jur n.s. 193.

(6) E. B. & E. at p. 793. 6 Jur N.S. 297

Then comes the question whether it was necessary to give notice within a reasonable time to the plaintiff of Mrs. Davison's disability, and whether, assuming that it was, reasonable notice was given; or, if not, whether the plaintiff has recovered inadequate damages. Now, I do not feel it necessary to decide whether or not notice is necessary, but it may well be that it is, at any rate where the illness which disqualifies the performer precedes by any considerable interval the day of the engagement, and where for some time before that day he is certain that he will be unable to fulfil his contract. But I assume in this case that notice was necessary, and that it was not given within a reasonable time; that Mrs. Davison should have telegraphed on the 13th of January, instead of sending a letter by the evening post. What the difference was between the loss actually occasioned to the plaintiff, and that which he would have sustained had a telegram been sent, was properly left to the jury, and I see no reason to interfere with their finding. The damages do not seem to me to be insufficient.

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(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(2) 3 B. & S., at p. 833.

Lastly, as to the application for a rule for costs under the County Court Act, 1867, s. 5, I do not think we should grant it. The plaintiff failed on the substantial question which he intended to try, and he is not entitled to a certificate for costs because he succeeded as to this trifling claim, which might well have been tried in a county court; and even upon this he could not have recovered, unless the learned judge had thought fit to amend the declaration. For these reasons, therefore, I am of opinion that the rule should be discharged.

My Brother Channell, who heard the argument, but has been obliged to leave the court, entirely agrees with this judgment. But he declines to express any opinion as to whether notice of the performer's disability was requisite. For the purposes of this rule he assumes that it was, but sees no reason to disturb the verdict on account of the damages being inadequate.

Bramwell, B. I am of the same opinion. I certainly think we ought not to grant a rule for costs. The plaintiff went to trial upon a cause of action which he failed to sustain, but succeeded, after having obtained leave to amend, in recovering a small sum upon his fresh cause of action. It is said that difficult questions of law were involved, but, as I have often said on other occasions, the true criterion is not the difficulty of the questions to be tried, but the amount recovered. And where the amount is below the limit specified in the County Court Act, then there should be no costs, unless indeed a question of right, or some important principle of general application, is involved.

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Then with regard to the amendment, assuming it was right to make it, and further assuming that the direction of the judge as to the necessity of notice was right, I think the plaintiff has recovered as much damages as he is entitled to. There remains only the main question, as to which I wish to add a few words. It is admitted that this lady was not fit to play; that it would have been dangerous to her life to go to the concert, and if she had gone that she could not have played efficiently. I think under such circumstances we may well hold that it was part of the bargain not merely that she should be excused from playing, but that she should not be at liberty to play. It cannot be, surely, that she would have had a right to insist on performing her engagement as best she could, however ineffectually that might have been, and then demand payment of her fee from Mr. Robinson.

It is contended, however, that to say that illness incapacitating from performance excuses, is to engraft a new term on an express contract. But this is really a fallacy, and one which obtained—I say it with respect—with some of the judges who composed the majority in *Hall* v. *Wright* (1); not, however, with all, because some of them intimated that the contract of marriage might be subject to the qualification insisted on by the defendant, and based their judgments on the fact that the contract declared on was unconditional in its terms, and on that ground held that the plea was no answer to it. The fallacy consists, first, in supposing there is in the first instance an absolute contract; and, secondly, that the new term is a condition added to its express terms; whereas the whole question is what the original contract was, and whether it was a contract with or without a condition. I may add, further, with regard to *Hall* v. *Wright* (1), that I retain the opinion I there expressed, and I think it entirely applicable to the present case. This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased: and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must in my judgment be taken to have been conditional, and not absolute. This is the conclusion I come to upon principle, and the cases cited seem to me in accordance with it.

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(1) E. B. & E. 746; 29 L. J. (Q.B.) 43. 6 Jur Ns 193

Cleasby, B. I am of the same opinion, and will add nothing except on the main question. This is a contract that a lady should perform as a pianist; that is, should undertake a duty requiring a high degree of skill and taste, and one which if not performed properly can hardly be said to have been performed at all. It is, moreover, a duty which could not be done by a deputy, but only by the lady herself, and, that being so, I think that disability or incapacity, caused by the act of God, excuses the defendant. The whole contract between the parties was based upon the assumption by both that the performer would continue living, and in sufficient health to play on the day named. This was really the very foundation of the promise, and where the foundation fails the promise built on it must fail also. Now here the foundation was wanting, for there was on Mrs. Davison's part an entire and total incapacity to do the thing contracted for. The law which governs the case is well stated in the judgment of Brett, J., in *Boast* v. *Firth* (1). His observations apply here, and I entirely concur in them.

Rule discharged.

Attorneys for plaintiff: *T. H. & A. R. Oldman.*
Attorney for defendant: *Lumley.*

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(1) Law Rep. 4 C. P., at pp. 8, 9.

BAILEY *v.* JOHNSON.

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June 2.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 39, 81—*Annulling Bankruptcy—Property "reverting" to Bankrupt—"Mutual Dealing"—Set-off—Money had and received.*

The defendant having been adjudicated bankrupt on a debtor summons issued by a banking firm of H. & H., a trustee was appointed, who realized the estate, and paid the proceeds into the bank of H. & H. in pursuance of a resolution of creditors. The firm of H. & H. were afterwards adjudicated bankrupts, the sum paid in by the trustee then standing to his credit in their books. Afterwards the order adjudicating the defendant bankrupt was reversed on appeal, and no order was made under s. 81 of the Bankruptcy Act, 1869, as to his property. In an action brought by the plaintiff, as trustee in the bankruptcy of H. & H., against the defendant, to recover the amount of his debt to them:—

Held, that the defendant was entitled to set off the amount so paid into the bank by the trustee in his bankruptcy, either as an equitable set-off or as a mutual credit.

[illegible] 77
[illegible] 98
12 Ch D 49
495, 501
15 Ch D 34
10 QBD 2

Affd in Ex Ch 7 Ex 263.

Action by the trustee in bankruptcy of the estate of R. A. Kerrison & R. Kerrison for money due from the defendant to the bankrupts and Sir Robert Harvey, deceased, on a banking account, and for money due on accounts stated between the plaintiff as trustee and the defendant.

Pleas: 1. Never indebted. 2. Payment. 3. On equitable grounds, that the defendant, having been adjudged bankrupt, and one E. M. Bullard having been appointed trustee of his property as such bankrupt, and Bullard having, as such trustee, become possessed of moneys of the defendant equal in amount to the plaintiff's claim, lent the same, before the bankruptcy of R. A. Kerrison & R. Kerrison, to the bankrupts and Sir R. Harvey; that the adjudication in bankruptcy against the defendant was duly annulled, whereupon the amount so lent by Bullard reverted to, and became, before action brought, due to the defendant, which amount the defendant claimed to set off against the plaintiff's claim. 4. To so much of the plaintiff's claim as related to money due on accounts stated between the plaintiff as trustee and the defendant, set-off of money due at the time of the bankruptcy of R. A. Kerrison & R. Kerrison from them and Sir R. Harvey, deceased, to the defendant. Issue.

The cause was tried before Blackburn, J., at the Suffolk Spring

Assizes, 1871. It appeared that the defendant was, in March, 1870, indebted to the banking firm of Harvey & Hudson (consisting of R. A. Kerrison, R. Kerrison, and Sir Robert Harvey) in the sum of 450*l.*

On the 26th of March a debtor summons was issued by the bank against the defendant, on which he was, upon the 17th of May, adjudicated bankrupt. On the 31st of May, E. M. Bullard was appointed trustee. He proceeded to realize the estate, and, in pursuance of a resolution of creditors under s. 30, paid into the bank proceeds to the amount of 665*l.*

On the 16th of July, Sir Robert Harvey having in the meantime died, the firm were adjudicated bankrupts, and the plaintiff was appointed trustee.

Subsequently the defendant's bankruptcy was annulled. (1)

It was contended that upon the annulling of the defendant's bankruptcy the amount due to Bullard, as trustee, became the property of the defendant under s. 81 of the Bankruptcy Act, 1869, and that he was now entitled to avail himself of it as a legal or equitable set-off against the plaintiff's claim, or as a mutual credit.

The learned judge directed a verdict to be entered for the defendant on the 3rd and 4th pleas, reserving to the plaintiff leave to move to enter the verdict for him. A rule having been obtained accordingly,

Brown, Q.C., *Bulwer, Q.C.*, and *Graham*, shewed cause. The defendant had a good set-off against the plaintiff. By s. 30 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and the supplementary 109th rule, the trustee is bound to pay whatever money he receives on account of the estate into such bank as the majority of creditors in number and value, or the committee of inspection, or the Court, may direct; or, failing any direction, into the Bank of England. The money in question was paid in pursuance of these provisions, and was, when so paid in, the property of the creditors, but subject to the contingency of the bankruptcy being annulled. The bankruptcy being annulled in fact, and no order made under s. 81, the money then, by virtue of that section, reverted to and became the property of the bankrupt, subject to

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(1) See *Ex parte Johnson*, Law Rep. 5 Ch. 741.

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any payment which might have been already made out of it. That the word "property" in s. 81 includes choses in action follows from the express provision of the interpretation clause (s. 4); and even without that provision the result would be the same: *Queensbury Industrial Society* v. *Pickles.* (1) The cases decided under the earlier Bankruptcy Acts, such as *Smallcombe* v. *Olivier* (2), can no longer be considered applicable, as present Act contains an express provision, not to be found in the earlier statutes, that the property shall revert to the bankrupt, which must be construed according to the ordinary sense of the words. In fact, therefore, it was always the property, not of the creditors, but of the defendant; although, by virtue of the saving in s. 81, dealings with it by the trustee properly made between the making and the annulling of the adjudication were unimpeachable. The interposition of Bullard, the trustee, makes no difference, the plea being equitable: *Cochrane* v. *Green.* (3) The bankers having full notice and knowledge of all the circumstances, there was in equity a good set-off at the time of the bankruptcy of Harvey & Hudson, a set-off which would have been allowed in bankruptcy, or would have been a foundation for a bill by the defendant to restrain an action by the bank: *Clark* v. *Cort* (4); *Bodenham* v. *Hoskins* (5); *Ex parte Adair, In re Gross.* (6) Having regard, indeed, to the words of the statute, it is probable that the defendant could have maintained an action against the bank for money had and received, in which case there would be a legal set-off: *Marsh* v. *Keating.* (7) It supports this view that the defendant could, on the other hand, not have maintained any action against Bullard, who had acted regularly, and was protected by the statute; if, therefore, he could not maintain an action against the bank, the words of s. 81 would, with respect to money so situated, have no *legal* effect at all. But even if there was not a set-off either at law or in equity, there was, at any rate, a "mutual credit" or a "mutual dealing" within s. 39, and therefore a matter for set-off in bankruptcy.

[They also referred to *Forster* v. *Wilson.* (8)]

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(1) Law Rep. 1 Ex. 1.

(2) 13 M. & W. 77.

(3) 9 C. B. (N.S.) 448; 30 L. J. (C.P) 97. 7 Jur N.S. 548

(4) Cr. & Ph. 154.

(5) 2 D. M. & G. 903; (reported below, 21 L. J. (Ch.) 864)

(6) 24 L. T. (N.S.) 198.

(7) 1 Bing. (N.C.) 198.

(8) 12 M. & W. 191.

O'Malley, Q.C., *Metcalfe*, and *Merewether*, in support of the rule. This money was never the property of the defendant at all, but of the creditors. Even assuming that it reverted to him under s. 81, this would only be by means of a right to sue in Bullard's name; and he acquired no such right until after the bankruptcy of Harvey & Hudson. But the intention of s. 81 is, that an order shall be made, which never has been made here; the order may direct that the property shall vest in some other person, or that it shall revert to the bankrupt; but without an order it is impossible to adjust the rights and relations that may have arisen during the bankruptcy. There was, therefore, at the time of the bankruptcy of Harvey & Hudson no right of set-off either legal or equitable, nor has any such since arisen. But, further, s. 81 is not applicable at all to the case; for here there has not been the annulling of a bankruptcy, but only an order reversing the decision of the Court below. It is still more clear that there has been no mutual credit or mutual dealing between the defendant and the bank. He was no party to the transaction between Bullard and the bank, nor did Bullard in any way act as his agent.

KELLY, C.B. I am of opinion that this rule should be discharged. Before the bankruptcy either of the defendant or of Harvey & Hudson, the bank were creditors of the defendant to the amount of between 400*l.* and 500*l.* Afterwards, the defendant having been made bankrupt, a sum of money was, before the bankruptcy of Harvey & Hudson, paid into the bank by Bullard, the trustee in the defendant's bankruptcy. Harvey & Hudson knew that they were creditors of the defendant; they knew also that the money paid in by Bullard was not his money, but that he was a trustee for the defendant's creditors; and they also knew that proceedings were pending to annul the defendant's bankruptcy, and that if these proceedings were successful, Bullard would be trustee no longer for the creditors of the defendant, but for the defendant himself. What then were the rights and liabilities of the parties? If under the circumstances the effect of the proceedings together was to make the money really the money of the defendant when it was paid in; then, as at the time of their bankruptcy Harvey & Hudson would clearly have had a right to a set-off if they had been sued by the defendant in the name of Bullard for the amount paid in, so also an equitable right of set-off would have existed in favour of the defendant in an action by Harvey & Hudson upon the balance due, or he would have had a right to file a bill to restrain the action. Now that this was in reality the money of the defendant is clear from the case of *Bodenham* v. *Hoskins* (1) and *Ex parte Adair, In re Gross* (2), which shew that if the whole case were before the Court of Bankruptcy or the Court of Chancery, this money would there be treated as his. Upon the other hand, it is equally clear that after the proceedings were annulled the trustee would no longer have the rights of a trustee for the creditors, and he would not be entitled to obtain the money out of the bank.

Reference has been made to s. 81 of the Bankruptcy Act, 1869, and to the effect of the reservation contained in it. That reservation was, I think, inserted to meet the cases where, before the annulling of the bankruptcy, various interests had been created and rights vested, as, for instance, by the distribution of some of the assets amongst some of the creditors, but not amongst others of them, and it was necessary that the Court of Bankruptcy should have power to take possession of the property in the hands of the trustee, or to order him to retain it for certain purposes. Here, however, no such order has been made. That question, therefore, being out of the way the only sensible meaning which can be attached to the word "revert" is, that what was apparently the property of the trustee at the time of the annulling of the bankruptcy, shall thereupon become the property of the person whose bankruptcy has been annulled, as if it had always been his.

Upon the whole, therefore, the result is, that this money was, when it was paid in, really and in equity the money of the defendant, although the trustee might, during the continuance of the bankruptcy lawfully dispose of it; that on the bankruptcy being annulled he and he alone could claim it; and that he may, therefore, now set it off against the claim of the bank upon him.

MARTIN, B. I am of the same opinion, though I have had great doubts upon it. It is clear that mutual debts or credits to be set off must exist at the time of the bankruptcy; the 39th section of the present Act being in substance the same as the mutual credit clause of the old Act, though differently expressed. Now, here, at the time of the bankruptcy of Johnson, Harvey & Hudson were entitled to prove against Johnson's estate, for the full amount of their debt, but afterwards, and before their own bankruptcy, they become indebted, not to Johnson, but to Bullard, in the sum sought to be set off. I have been satisfied, however, in the course of the argument, that the Act transferred to Johnson the debt due from the bank to Bullard; and we may, therefore, read the phrase "mutual credit" as including the right of Johnson, who may be deemed a person claiming through or under Bullard. The set-off is therefore established.

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(1) 2 D. M. & G. 903; (reported below, 21 L. J. (Ch.) 864.)
(2) 24 L. T. (N.S.) 198.

BRAMWELL, B. I am of the same opinion: and I entertain no doubt upon the matter beyond what one must always feel in dealing with questions involving equitable rights. If Johnson's bankruptcy had not been superseded, the plaintiff in this action could not have insisted on proving against Johnson's estate, and leaving Bullard to prove against the estate of Harvey & Hudson; there would be as it were a mutual credit between the two estates. Then what is the effect of the bankruptcy being superseded? I should have a difficulty in saying there was a set-off if we had to rely on the word "revert," in s. 81. I give no opinion on the effect of that provision, or upon the question whether he could have sued the bank in his own name. But I think that the cases cited shew that Johnson could follow the money; and that he was entitled to give notice to the bank to pay him, and not to pay Bullard. It is said that difficulties may arise in some cases; that may be so, but none are suggested here. Therefore I think Johnson had a good equitable right to the money paid by Bullard into the bank, and, if so, he takes it with the title which Bullard had, including the right to set-off which the one estate had against the other. I think therefore, that the plea is made out.

A difficulty occurred to me, which I mention, in order to remove it. Suppose the plaintiff had brought an action against Johnson, and the bankruptcy had not been superseded, there would have been no set-off; and if so, how can a right accrue to him by the superseding of it? Two answers may be given. The first is, that by s. 12, no action can be proceeded with against the bankrupt without the leave of the Court; and that under s. 13 no Court would allow such an action to be brought by the trustee on behalf of a person who was the petitioning creditor, and who knew of the interest which the bankrupt had in the money, without allowing that sum to be set off. Another answer is, that though Johnson could not have pleaded a set-off in such an action, he can now plead it, because there has been a dealing between them which has resulted in a debt to him, though it would not have done so if the bankruptcy had continued; there is therefore a mutual credit.

Cleasby, B. I am of the same opinion. It seems to me that there is a third answer to the difficulty, which my Brother Bramwell has raised, that Johnson could not plead this set-off, because the money was not his, but Bullard's. It has been said that the property in chattels can be followed, but not the property in a debt; but in equity a debt is as assignable as a chattel is in a court of law. "If A. having a debt due to him from B. should order it to be paid to C., the order would amount, in equity, to an assignment of the debt, and would be enforced in equity, although the debtor had not consented thereto:" Story on Eq. Jurisp. § 1044. The effect, then, of the assignment of a debt is, that the whole title and interest is in equity vested in the assignee of the creditor, with a right to use the name of the assignor to recover it. Here Johnson takes the debt by virtue of the Act, which says it shall, upon the bankruptcy being superseded, belong to him; and if so, he has the same title which Bullard had, and by relation can make use of that right, the Act placing him in the position of the trustee with all its advantages.

But I am disposed to go further, and to think that he would have a title at law to recover this as money had and received to his use. I think this is shewn by *Marsh* v. *Keating* (1), where the plaintiff, whose stock had been sold under a forged power of attorney, was held entitled to recover the price at which it was sold from the person receiving the proceeds. The case of *Allan-*

(1) 1 Bing. N. C. 198.

son v. *Atkinson* (1) is also in point. There similarly the assignees were held entitled to recover the proceeds of goods of the bankrupt improperly disposed of by the sheriff, from the creditors to whom they had been paid, as money had and received. These cases shew that if Harvey & Hudson had not become bankrupt, Johnson could have maintained an action against them. To the same effect is *Follett* v. *Hoppe* (2), where the circumstances were very similar to those of *Allanson* v. *Atkinson* (1), and where Maule, J., says, "In general where money which belongs to one person has been received by another, without that person's authority, the action for money had and received will lie to recover it back." Therefore, if the money remained in the hands of the bank, I think Johnson might, by virtue of the Act, have sued Harvey & Hudson.

Rule discharged.

Attorneys for plaintiff: *Sole, Turner & Turner.*
Attorney for defendant: *Lewis Hand.*

June 5.

DE LANCEY *v.* THE QUEEN.

Legacy Duty Act (36 *Geo.* 3, *c.* 52), *s.* 19—*Money to be laid out in Land—Unconverted Fund falling into Possession.*

A testator, who died in 1800, by his will, bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C. (his eldest son) for life, remainder to C.'s first and other sons in tail male, remainder to J. (his second son) for life, remainder to J.'s first and other sons in tail male; remainder to his own right heirs.

C. and J. died without issue and intestate, and S., the testator's only daughter, became entitled to the fund, being heir-at-law of the testator, as well as of C. and J. She died intestate, and at her death the fund, which had never been invested in land, passed to E., who was grandnephew of the testator, and heir-at-law of the testator and of C., J., and S.:—

Held, that under s. 19 of 36 Geo. 3, c. 52, duty was payable by E. at 5 per cent. as on a bequest from S.

Affd in Ex Ch 7 Ex 140

PETITION of right, setting out the facts stated in the case of *In the Matter of De Lancey's Succession* (3), and the decisions of this Court and the Court of Exchequer on the question there raised,

(1) 1 M. & S. 583.
(2) 5 C. B. 226, at p. 242; 17 L. J. (C.P.) 76, at p. 81.
(3) Law Rep. 4 Ex. 345; 5 Ex. 102.

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stating that the petitioner, Edward Floyd De Lancey, a grand-nephew of the testator, was the heir-at-law of Charles Stephen, James, and Susan De Lancey, and entitled to the fund bequeathed by the testator to be laid out in land; that the Commissioners of Inland Revenue refused to return to the petitioner the sum paid to them upon their erroneous assessment of succession duty at 5 per cent., and claimed to retain it, although they had made no assessment of legacy duty in respect of the fund, and although the legacy duty payable was only at the rate of 2½ per cent., and claiming a return of the whole of the sum so paid, or the balance, after deducting legacy duty at 2½ per cent., with interest.

Plea: That the legacy duty payable on the fund was at the rate of 5 per cent., being duty payable as on a legacy or residue of personal estate coming to the petitioner from Susan De Lancey.

Demurrer.

Sir J. B. Karslake, Q.C. (*Townsend* with him), for the petitioner. The Exchequer Chamber having now decided that legacy duty, and not succession duty, is to be paid, the question of the rate must be determined by 36 Geo. 3, c. 52, s. 19. (1) By the pro-

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(1) 36 Geo. 3, c. 52, s. 19: "Any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with, and pay, duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession; and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: *Provided*, nevertheless, that in case, before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

By 55 Geo. 3, c. 184, sch. pt. iii. tit. "Legacies and Succession to personal or moveable estate upon intestacy" where the testator or intestate died before the 5th of April, 1805, duty was made payable at 2½ per cent. upon a devolution to or for the benefit of a brother or sister of the deceased, or any descendant of such brother or sister, and at 4 per viso in that section the same duty is to be paid by the person who becomes entitled to an estate of inheritance in possession in the real estate to be purchased, as if he were absolutely entitled to the unconverted fund by bequest. The bequest spoken of must certainly be the bequest of the person who directed the fund to be laid out in land; no other testator is mentioned in the section, nor is there any other will by virtue of which the petitioner in fact takes the fund. But he does take it under and by virtue of that will; for it is in consequence of the character of realty impressed upon the fund by the will that he becomes entitled to it. To say that he takes as by the bequest of Susan, which is the contention of the Crown, is to say that he takes as by the bequest of a person who herself refused to take any interest in the fund. (1) Further, the amount claimed, even if rightly claimed, is not a sum which the Crown can set off. No assessment has yet been made.

Sir R. P. Collier, A.G. (*Hutton* with him), for the Crown (called upon as to the latter point only). 36 Geo. 3, c. 52, s. 6, makes the duty payable on any legacy a debt to the Crown from the persons taking the burthen of the execution of the will, who are trustees for the petitioner. Assessment is not required to make it a debt.

Kelly, C.B. I am of opinion that the Crown is entitled to our judgment. Under s. 7 of 23 & 24 Vict. c. 34, the Crown is entitled to plead a set-off in answer to a petition of right. Here there is a plea which, though not in a very precise or formal manner, claims a set-off; and it is not material to consider in what exact manner the right of the Crown arises if the Crown is in fact entitled as against the petitioner to a sum equal to that which is sought to be recovered.

The question, then, is, whether duty is payable by the petitioner as upon a bequest from the testator, or as upon a bequest by

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cent. on a devolution to or for the benefit of a brother or sister of the father or mother of the deceased or any descendant of such brother or sister; but where the testator died after the 5th of April, 1805, duty was payable at 3 per cent. and 5 per cent. in the respective cases. The testator, James De Lancey, died before the 5th of April, 1805, and therefore if the petitioner took from him, duty was payable at 2½ per cent.; Charles, James, and Susan all died after that date, and therefore if the petitioner took from them or either of them, duty was payable at 5 per cent.

(1) See Law Rep. 4 Ex. at p. 346.

Susan, the person who was last entitled to the fund. The fund in question has never been converted, and therefore the proviso of s. 19 applies. (1) By that proviso the amount of duty payable is the duty which the person taking the fund would be liable to pay if he were entitled to it as personal estate by virtue of *any* bequest thereof as such, the words expressing only the nature of the bequest to him, but not indicating its author. Is, then, the petitioner to be treated as absolutely entitled to the fund by the bequest of his great uncle, or as so entitled by the bequest of Susan? I think the latter. It is argued that it must be the testator, because the money, in fact, comes to the petitioner under his will. But the phrase is ambiguous. No doubt, in the sense that a particular clause in the will impresses the fund with the character of real estate, it is by virtue of the will that the petitioner takes. But when we look to the limitations of the will we find that its effect had altogether ceased when the fund reached Susan. The limitation to the testator's right heirs vested the fund successively in Charles, James, and Susan; and Susan, taking it in possession as heir-at-law, might have sold or willed it away absolutely. The operation of the will had therefore ceased, and the petitioner takes the fund under a title derived from Susan. But it is the person from whom he takes that we are to look to in considering who is the person whose bequest is referred to in the statute for the purpose of ascertaining the amount of duty to be paid. Susan, therefore, is the person by whose bequest the petitioner is, for the purposes of the Act, to be considered to have taken, and duty is therefore payable at 5 per cent.

MARTIN, B. I am of the same opinion. Treating this as a gift of real estate, the effect of the will was, that on the testator's death Charles became entitled to a life estate in the land, with various remainders over; and in addition became entitled to a remainder in fee simple, which he had power to alienate, or to devise by will, or in any other respect to treat as his property. On his death this estate in remainder passed to James, as his heir-at-law; and upon the death of James, Susan took it as heir to her two brothers. Now we must deal with the Act of Parliament with reference to the state of the law which makes money bequeathed in the manner in which this will bequeathes it equivalent to land. The proviso is not very intelligibly expressed, but the words "entitled to an estate of inheritance in possession in the real estate to be purchased therewith," must mean entitled to an absolute interest in the money which was bequeathed to be laid out in the purchase of land. Reading it so, then I think the meaning of the further words is, that the same duty is to be paid as if it were taken by bequest from the person last entitled in possession to an absolute interest in the money; and that person was Susan. The bequest is to be taken as a bequest from the individual from whom, following the analogy of the devolution of the property if it had been real estate, the person taking the fund in fact derives his title.

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(1) See ante, p. 287, n.

Bramwell, B. The Court of Exchequer Chamber having decided that legacy duty and not succession duty is payable, I am of opinion that five per cent. is the amount of the duty to be charged. It may be a question whether there is a debt to the Crown which is the proper matter of a set-off. But, in one way or another, the Crown is entitled to retain the money, either to avoid circuity of action, or on the ground that the persons who are responsible for making, and who have in fact made, the payment, are the persons who have to administer the fund to pay the legacies; and if so, the money claimed never belonged to the petitioner, but to some one else. He cannot therefore get it back, but only those can who are entitled to it. Either way, therefore, our judgment must be for the Crown.

Cleasby, B. There is some difficulty in applying the words of the proviso to any bequest but that under the will, and it might be suggested that the first part of the section alone imposed any duty, and that the proviso might be taken as regarding only a devolution from the testator, and as directing that, in estimating how much duty should be paid, regard should be had to the relationship of the person taking the absolute interest, to the testator by whose will the money is directed to be applied in the purchase of real estate. And one difficulty in holding otherwise is, that if Susan had made a will bequeathing this fund, there would have been no words in the clause to meet the case; for the proviso only applies to persons taking an estate of inheritance, and could not apply to persons who took by bequest from the person owning the absolute interest in the unconverted fund. But this construction would hardly be consistent with the judgment of the Court of Exchequer Chamber, and I therefore arrive at the same conclusion as my Lord and my learned Brothers.

Judgment for the Crown.

Attorneys for petitioner: *Townsend, Lee, & Houseman.*
Attorney for Crown: *The Solicitor of Inland Revenue.*

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May 22.

Will—Rule in Shelley's Case—Heirs "and Assigns"—Persona Designata—Ultimate Limitations—Child "born or to be born."

A testator, by a settlement made on the marriage of his daughter, covenanted with trustees to leave an equal child's share of certain freehold property to the use of her husband for his life or until insolvency, with remainder to her use for life, remainder to the use of the issue of the marriage, with specified limitations; and if there should be no issue, or there being issue all should die under twenty-one years of age, then to the use of her heirs "as if she had died sole and unmarried." His will recited the settlement, and the limitations contained in the will substantially coincided with those contained in the settlement. The ultimate limitation was as follows:—"And in case every child born or to be born shall die under the age of twenty-one years, and without leaving issue, then to the use of the heirs *and assigns* of E. A. V. (the daughter) as if she had continued sole and unmarried," with remainder to the testator's right heirs. There were three children born of the marriage. Two died in infancy, and previous to the date of the will; one was alive at that time, and lived until the age of twenty-three. He predeceased the testator, who died in 1849. The husband of E. A. V. became insolvent in the following year. E. A. V. died in 1868. In ejectment by the plaintiff, who filled the double character of heir-at-law of the testator and of E. A. V., against the defendant, an "assign" of E. A. V.:—

Held, first, that the ultimate limitation never took effect, and that the plaintiff was entitled to recover as heir of the testator; and secondly, that, assuming it to have taken effect, the plaintiff being the heir of E. A. V., as if she had remained sole and unmarried, was entitled to recover as persona designata.

Quested v. *Michell* (24 L. J. (Ch.) 722), commented upon. / Jur N.S. 459
Affd — Ex Ch L R 7 Ex 271

SPECIAL CASE. By articles of agreement, dated the 11th of April, 1823, made in contemplation of the marriage of Elizabeth Ann

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Brookman, daughter of Thomas Brookman, with Emanuel William Violett, Thomas Brookman covenanted with trustees that if the marriage was solemnized and Elizabeth survived him, or dying should leave any child or children, or issue of child or children, he would by his last will give and devise, or otherwise well and effectually settle and assure to proper trustees, a child's share or equal part with his other children of all the real and personal estates he should die seised or possessed of, to the use of Emanuel William Violett and his assigns for life, with remainder to trustees and their heirs during his life, with remainder to the use of Elizabeth and her assigns for her life, with remainder to trustees and their heirs during her life, to preserve contingent remainders, with remainder to the child or children of the intended marriage, for such estates as Emanuel and Elizabeth should jointly appoint, and in default, as the survivor should appoint or devise, and in default, to the use of the children equally as tenants in common, and their heirs and assigns, with a clause of survivorship or accruer in case of any of the children dying under twenty-one without issue; and if there should be but one such child, and such one child should live to attain the age of twenty-one years, or dying under that age should leave lawful issue, then to the use of such one remaining or only child, his heirs and assigns; "and if there shall be no child, or, there being such child or children, if all of them shall die under the age of twenty-one years and without any of them leaving lawful issue, then to the use of the heirs and administrators (according to the tenure or quality of the property) of Elizabeth Ann Brookman *as if she had died sole and unmarried*." The articles further declared that in case Emanuel should become bankrupt or insolvent, then the profits of the trust estates limited to him for life should cease as if he were dead, and that the trustees should pay these profits to Elizabeth, if she should be living, during the joint lives of herself and her husband, for her sole and separate use; and in case at the time of the bankruptcy or insolvency she should be dead, or if she should afterwards die leaving Emanuel surviving, then the trustees should stand possessed of the trust estates on the same trusts as were thereinbefore declared concerning the same from and immediately after the death of the survivor of Emanuel and Elizabeth, in like manner as if Emanuel were dead; provided that in case Elizabeth should die in Thomas Brookman's lifetime without issue surviving her, then the covenant as to a child's share should cease. It was further declared that the will of Thomas Brookman, and the settlement to be made, should be penned in the most full, clear, explicit, and liberal manner to effect the intention of the parties.

Shortly after the date of these articles the intended marriage took place. On the 23rd of January, 1840, Thomas Brookman made his will, whereby, after reciting the marriage articles and his desire to perform his covenants specifically according to their true intent and meaning, he devised, amongst other estates, the freehold property now in question to trustees to the use of Emanuel Violett and his assigns until he should die or become bankrupt or insolvent, and after his bankruptcy or insolvency, in case his wife should be then living, to the use of the trustees, their heirs and assigns, on trust during the joint lives of Emanuel and Elizabeth, for her separate use without power of anticipation, and after his death to her use for life, with remainder to the use of their children as they or the survivor should appoint, and in default of appointment to the use of all and every their children and child as tenants in common, with benefit of survivorship in the event of any child dying under twenty-one without leaving issue; "and in case every child born or to be born should die under the age of twenty-one years, and without leaving issue, then to the use of the *heirs and assigns* of Elizabeth Ann Violett *as if she had continued sole and unmarried*," with remainder to the testator's right heirs, in case Elizabeth should die in his lifetime and without leaving issue surviving her.

At the time the will was made, Elizabeth Ann and Emanuel Violett were both living. They had had three children, only one of whom was then surviving. The other two had died previously under the age of twenty-one. The survivor, Thomas Brookman Violett, attained that age and died in the year 1847, a bachelor, aged twenty-three. In 1849 the testator died, and during the following year Emanuel Violett became insolvent. In 1855 Mrs. Violett, by deed acknowledged, made a settlement of her interest in the real and leasehold estates comprised in the above devise, giving herself a power of appointment by deed or will. She died in

1868, having exercised her power in favour of George Smith, the defendant. No more children were born of the marriage besides the three above mentioned. This action was brought by James Brookman, who filled the double character of heir-at-law of the testator and of Elizabeth Ann Violett, to recover from the defendant the estates appointed to him, and of which he entered into possession on the death of Elizabeth Ann Violett. The question for the opinion of the Court was, whether the plaintiff was entitled to recover all or any of these estates.

Jan. 16, 18, 23. *Waley* (*Pinder* with him), for the plaintiff. The husband, Emanuel Violett, being still alive, the first question is in whom during his life, but after his insolvency and after his wife's death, is the legal estate. It will be perhaps contended that the trustees still possess it; but on the true construction of the limitations it clearly passed from them on the death of Elizabeth Ann Violett. They only took an estate commensurate with the duties which they had to perform, and by the death of the wife those duties were terminated. [This point was conceded by the defendant.] Then there remains the really substantial matter in dispute. Did the plaintiff, who is the heir-at-law of the testator and also of Elizabeth, take the property on her death; or did it pass to the defendant, who claims under a deed of assignment executed by her and duly acknowledged? The answer depends on the meaning to be attached to the words of the will, which are to be interpreted, although not controlled, by the marriage articles. Now first, the event on which the ultimate limitation to Elizabeth and her heirs and assigns, as if she were sole and unmarried, takes effect, never happened. One child did reach the age of twenty-one, and that excludes the ultimate limitation. Then this child having died after twenty-one, in the testator's lifetime, the plaintiff is entitled as heir-at-law of the testator: Jarman on Wills, 3rd ed. vol. ii., p. 758; *Tarbuck* v. *Tarbuck.* (1) The words ushering in the limitation should be read as though the name of the child who was in existence when the will was penned were mentioned. They will then be as follows—"In case T. B. Violett, or any other child born or to be born, attain the age of twenty-one," &c.; and this construction points the paragraph, and indicates the testator's intention, that if any child of Elizabeth attained twenty-one the ultimate limitation to her heirs, &c., should be inoperative. It is true the child who reached that age died, living the testator. But that makes no difference in the rule of construction, which depends on the state of the family when the will was made, and must be applied just as though T. B. Violett had survived the testator. Secondly, assuming the ultimate limitation to have taken effect, the plaintiff is still entitled as the heir of Elizabeth and *persona designata*. There is in this will a vested life estate in remainder in Elizabeth, with a limitation immediately to her heirs and assigns, as if she were sole and unmarried. It will be said by the defendant that the rule in *Shelley's Case* applies, and that Elizabeth took an estate not for life merely; but that the estates coalesce, and the ultimate limitation is to be read as though Elizabeth took an estate in fee simple. But in order to apply the rule in *Shelley's Case* two requisites must be satisfied: (*a*) The ultimate limitation must be to the heirs of the person having a life interest, as a class, and meaning heirs in the ordinary sense of *all* the heirs; and (*b*) it must be by way of remainder vested or contingent, and not by way of executory devise. Now here the "heirs" of Elizabeth, using the word in the ordinary sense, have already been dealt with, and the limitation only deals with her heirs as if she were sole and unmarried, i.e. her collateral heirs. A child of hers could not take under the clause, which contemplates an entire extinction of Elizabeth's issue. Again, the limitation is by way of executory devise: Fearne's Contingent Remainders (ed. 1827, by Butler), p. 276; *Loyd* v. *Carew* (1); Jarman on Wills (3rd ed.), vol. ii. p. 306.

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(1) 4 L. J. (N.S.) Ch. 129.

But it would seem that, on this reading of the clause, no effect is given to the word "assigns." In fact, however, no word in conveyancing language is more insignificant. Probably it was inserted in accordance with the common form. It certainly ought not to govern the meaning to be placed on the clause. Moreover the marriage articles, in execution of which the will professes to have been made, do not contain the word, and it should on that account be treated as surplusage.]

[MARTIN, B. The proviso which immediately follows the clause

(1) Prec. in Chanc. 72.

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may be said to shew that the intention of the testator was that the daughter should have an estate in fee simple.]

That was not his absolute intention; he made the will to fulfil an onerous obligation, but when the whole document is looked at, it is plain he desired to get quit of the obligation, provided no children of his daughter survived him. The plaintiff's construction is both in accordance with the strictest rules of interpretation, and with the real desire of the testator.

Joshua Williams, Q.C. (*Tindal Atkinson* with him), for the defendant. The limitation to Elizabeth, her heirs, &c., took effect, all the members of the class whom the testator designed, and was bound under the articles to provide for, being dead when he died; and the circumstance that one of them reached twenty-one is immaterial, as he did not survive the testator. Where a gift is *to a class,* as here to the children of Elizabeth, the rule of construction is that only the members of the class who are alive when the testator dies are intended: Jarman on Wills (3rd ed.) vol. ii. p. 306; and if they are all removed at his death, the gift over takes effect: *Mackinnon* v. *Sewell* (1); *Evers* v. *Challis.* (2) Thomas Brookman Violett is not expressly mentioned, and therefore the reason of the observation cited from Jarman on Wills (3rd ed.) vol. ii., at p. 758, does not apply: *Doo* v. *Brabant* (3); *Meadows* v. *Parry* (4); Jarman on Wills (3rd ed.), vol. ii. p. 751. *Tarbuck* v. *Tarbuck* (5) is distinguishable.

Then the question arises as to the real meaning of the limitation. It was designed to give Elizabeth an unlimited power of disposition, which she has exercised in the defendant's favour: *Tapner* v. *Merlott* (6); Sugden on Powers (9th ed.) pp. 106, 108. It is true that sometimes the word "assigns" has little meaning, but here it has a sensible importance. It confers a power of appointment on Elizabeth "as if she were sole and unmarried;" and although it is not in the marriage articles, its insertion is quite consistent with them, and was necessary to effectuate the testator's real intention. *Quested* v. *Michell* (7) is in point. More-

(1) 2 M. & K. 202.
(2) 7 H. L. C. 531.
(3) 4 T. R. 706.
(4) 1 V. & B. 124.
(5) 4 L. J. (N.S.) Ch. 129.
(6) Willes, 177, 180.
(7) 24 L. J. Ch. 722. 1 Jur NS 480

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over, the rule in *Shelley's Case* applies, and Elizabeth took the whole estate, as well as a power to appoint it. The words, "as if she were sole and unmarried," are to be taken in connection with the word "assigns," and not with "heirs and assigns;" so that "heirs" may be read in its ordinary meaning, and then the rule would prevail, the limitation being clearly by way of contingent remainder, and not of executory devise: *Evers* v. *Challis.* (1)

Waley, in reply. *Quested* v. *Michell* (2) appears to have been decided with reference to the very peculiar provisions of the will, and it is a case which is not supported by other authorities, and inconsistent with the view generally adopted in practice of an ultimate limitation to "heirs and assigns." Moreover, here the marriage articles shew that the word "assigns" ought not to be considered: *Bullock* v. *Bennett.* (3)

Cur. adv. vult.

May 22. The judgment of the Court (Kelly, C.B., Martin, Pigott, and Cleasby, BB.) was delivered by

CLEASBY, B. This case was argued before the Lord Chief Baron, Martin and Pigott, BB., and myself, and I have now to deliver the judgment of the Court. The question arises upon the will of Thomas Brookman. It bears date the 23rd of January, 1840, and was made under rather unusual circumstances.

In the year 1823, by a deed of settlement made upon the marriage of his daughter Elizabeth Ann with one Emanuel William Violett, he had covenanted with the trustees to make a settlement by will of an equal child's share of his real and personal property upon his daughter, her intended husband, and the children of the marriage with specified limitations. This settlement is recited in the will, and it is also recited that the will is intended to carry it into effect; and the limitations contained in the will are substantially to the same effect as those provided for in the settlement, with some slight differences which will be adverted to. It is unnecessary to repeat here the words of the limitations, as the will forms part of the case. They are, so

(1) 7 H. L. C. 531.

(2) 24 L. J. Ch. 722. / Jur N S400

(3) 7 De G. M. & G. 283; 24 L. J. (Ch.) 512.

far as is material to the present case, in substance as follows:—"To the use of husband for life, or until he becomes bankrupt, or takes the benefit of the Insolvent Debtors Act; then to the use of the trustees during the joint lives of husband and wife, upon trust to pay the rents, &c., to the wife for her sole and separate use, free from debts of husband, but not by way of anticipation; to the wife for life if she survives her husband; then to trustees to preserve contingent remainders during the life of the wife; then, subject to power of appointment among the children, to all the children of the marriage in fee as tenants in common, with benefit of survivorship; and if only one child, to the child in fee." And then comes the clause upon which the question arises, which is in the following terms: "And in case every child of the said Emanuel William Violett, by Elizabeth Ann his wife, born or to be born, should die under the age of twenty-one years, and without leaving issue born, or to be born in due time afterwards, then I direct that the last-mentioned freehold messuages shall go, and remain, and be, to the use of the heirs and assigns of my daughter, Elizabeth Ann Violett, as if she had continued sole and unmarried." This limitation is hereafter called the "ultimate limitation."

The facts necessary to be noticed in order to determine the effect of the will are, that there were three children of the marriage, all of whom died in the lifetime of the testator. Two of them died in infancy, but one attained the age of twenty-one years, and died in the year 1847, aged twenty-three years. It was stated upon the argument that when the will was made the last-mentioned child was the only one living. The testator died in the month of October, 1849. In the year 1850 Emanuel William Violett presented his petition to the Insolvent Debtors' Court, and took the benefit of the Act for the Relief of Insolvent Debtors. Elizabeth Ann Violett died in 1868, leaving her husband surviving.

Two questions arise in this case:—first, whether, under the circumstances which have taken place, the ultimate limitation has taken effect?—secondly, what is the proper effect of the ultimate limitation? Upon the first question the plaintiff contends that the devise over was upon an event which did not happen, and that he, as heir-at-law of the testator, was entitled. The words of the will, taken strictly, apply only to the case of the children or child of the marriage dying under twenty-one and without leaving issue, and do not, so taken, include the case of there never being any children who could take.

The answer to this on behalf of the defendant was, that upon such a devise to a class like children, and a devise upon failure of the class by death under twenty-one and without issue, the devise over would take effect; or, as it is sometimes expressed, there is an implied devise over in the event of there being no children at all, capable of taking under the will. For this several authorities were referred to: *Meadows* v. *Parry* (1); *Mackinnon* v. *Sewell* (2); *Doe.* d. *Evers* v. *Challis* (3); and *Evers* v. *Challis.* (4) In the first-named case the Master of the Rolls disposes of the matter in a word, saying that it is not distinguishable from the case (*Jones* v. *Westcomb* (5)) where a testator devised to the child with which his wife was enceinte; and if such child died before twenty-one, then over. And the devise over was held to be good, though the wife proved not enceinte.

The authorities referred to shew that, as a general rule, the devise over takes effect when the previous estate fails for want of persons to take under it.

In the present case the rule is said not to be applicable for two reasons:—first, from the particular language preceding the ultimate limitation taken in connection with the existing state of things when the will was made; and, secondly, from the fact that after the will was made one of the children attained the age of twenty-one years, though he died in the lifetime of the testator.

The peculiarity of the language in the present case is the introduction of the words "born, or to be born." If these words are to be read as though they were used at the death of the testator, and if they signify, as contended for by the defendant, "which have been born and are living at the time of my death, or are born afterwards," then it appears to me that the present case would not be distinguishable from the other cases, and the rule must apply, and the ultimate devise take effect. Upon that supposition the class actually designated by the will would be the children alive at the death of the testator; and if there were none then alive the class would fail altogether, and the case would then be in principle the same as *Mackinnon* v. *Sewell* (1), already referred to, where the devise was to the children of the devisee alive at her decease.

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(1) 1 V. & B. 124.
(2) 2 My. & K. 202.
(3) 20 L. J. (Q.B.) 113.
(4) 7 H. L. 531.
(5) 1 Eq. C. Ab. 245.

It was suggested in furtherance of this view that the effect of the clause is the same, whether the words "and now alive" are inserted or not, because in general a devise to a person can only take effect if that person is alive at the death of the testator. But this appears to us to be incorrect. It is confounding two things which are quite distinct, viz., the effect of the clause taken by itself, and its effect in construing other parts of the will. It makes no difference, as regards a person taking an estate under a will, whether the devise be to him generally, or whether it be to him expressly in case he survives the testator. If he dies in the lifetime of the testator, he cannot take in either case; but the difference is, that in the one case the estate fails by lapse, which generally is not contemplated by the testator, and in the other case it fails by the event which is contemplated and provided for. The law now recognizes the fact that lapse is not contemplated by the testator; for by the Statute of Wills (7 Wm. 4 & 1 Vict. c. 26, s. 33) it is enacted, that in cases of devise to a child or issue of the testator of any estate of inheritance the devise shall not lapse, but shall take effect in favour of the issue of the devisee, if alive at the death of the testator, just as if the death of the devisee had happened immediately after the death of the testator. But are those words to be read as spoken at the death of the testator, and in the sense mentioned? The words actually used are "born or to be born." There is, in the first place, this obvious objection to reading these words as if they were used at the death: viz. that, if so used, they would require the additional words "and now alive" to be added to them, so as to make the words "born and now alive, or to be born," otherwise the limitation could not come in at all; for the word "born" cannot be rejected, and the limitation is to take effect in case a child born, or to be born, died under twenty-one and without issue. But a child had been born and attained twenty-one, so that the condition upon which the estate was to go over failed altogether; and, in order to give effect to those words as if they were used at the death, other words, "and now alive," must be added, importing an additional condition, and this of itself seems an almost insuperable objection to reading them as so used. If the words were "now born or to be born," there can be no doubt that they must refer to the date of the will; or if they were "born, or to be born hereafter," they must equally refer to the date of the will.

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(1) 2 My. & K. 202.

In the present case there are no explanatory words, and we have to deal with the words themselves. It often happens, in applying the words of a will to its proper object, when those words, taken by themselves, might apply to several objects, that we have to refer to the state of facts at the time of making the will. It is only necessary to refer to the well-known illustration of this given by Mr. Jarman in his work on Wills (3rd ed.) vol. i. p. 304: viz., that a devise to the wife of A., and no more, refers to the wife of A. at the time of making the will, if he has one at that time, and to no one else. But if A. has no wife at that time, then to his wife at the death of the testator.

Now, in the present case, the circumstances to be considered are the settlement (recited in the will) which the testator was carrying into effect, and the fact of there being a son alive, of the age of about sixteen, when he was engaged in carrying it into effect. There is a striking difference in the language of the settlement and of the will as regards the circumstances under which the ultimate limitation is to come into operation. The words of the settlement are: "And if there shall be no child of the marriage, or if," &c. Now, at the time of making the will the testator could not use these words, because there was then one son living, and no one can doubt that this fact caused the altered language in the will. It was having regard to that fact that the words in the will are: "Child born, or to be born." It seems to follow from this that the testator had in his mind the existence of one of the class to take, and having that in his mind, he used the words "born, or to be born."

The case, then, is rather one of an omission of the testator to provide for the case of a lapse than of a class contemplated not coming into existence. It is right to add that what has been said is not in the slightest degree at variance with the judgment of

Lord Justice Giffard upon this will in the case referred to: *In re Brookman's Trusts* (1); but in entire conformity with it so far as it goes. The Lord Justice decided in that case, in which there was an application on behalf of the father to come in, as heir of the son, on the ground that the son, who had attained twenty-one, had a vested interest under the settlement and will taken together, that the testator had not provided for a lapse, and that there was no obligation upon him to provide for a lapse; and he overruled the decision of Vice-Chancellor Malins, which was in favour of the representative of the son, and was founded rather upon what ought to have been provided for than upon what was provided for.

If the view taken of the will is correct, and the case is properly described as one of lapse, then it is more like the case of a devise to a designated person than to a class which does not come into existence, and the defendant must fail, because it would not be contended — and the argument was, in fact, repudiated—that in the case of a devise to A., and in case he died under twenty-one to B., the devise over to B. would take effect if A. lived to attain twenty-one, and afterwards died during the lifetime of the testator.

It is deserving of notice that in the deed of conveyance and settlement by Elizabeth Ann and her husband executed in 1855 (I mean in the copy supplied to me), the will of Thomas Brookman is recited; but in the recital of the limitations in question, which is in other respects exact and full, the words "born, or to be born," are omitted. This is accounted for by the fear that if those words were inserted, the title of the persons conveying would appear upon the face of the deed to be defective, without a further recital as to no child being born, which could not be made.

But apart altogether from the particular language of the will in the use of the words "born, or to be born," a further question arises, whether the fact of the son attaining twenty-one in the present case does not of itself prevent the ultimate limitation from taking effect? Upon this question it is impossible in the compass of this judgment to examine all the numerous cases which bear upon it. They are, many of them, discussed in the judgment in *Mackinon* v. *Sewell* (2), and are to be found in the 2nd vol. of Mr. Jarman's work on Wills, 3rd ed. p. 757. There are also since decided, *In re Betty*

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(1) Law Rep. 5 Ch. Ap. 182.

(2) 2 My. & K. 202.

Smith's Trusts (1), and *Warren* v. *Rudall.* (2) In some apparent conflict of authorities it is worth while to observe that the certificate of the Court of Queen's Bench in *Doo* v. *Brabant* (3)—and which was against the opinion expressed by Lord Thurlow in that case (4), when he sent it to the court of law—was afterwards confirmed and acted upon by the Lords Commissioners holding the Great Seal; and that the decision of Lord Alvanley in *Calthorpe* v. *Gough* (5), (and which Lord Thurlow had questioned), was strongly maintained by the learned judge in *Holmes* v. *Craddock* (6), and that *Tarbuck* v. *Tarbuck* (7), which really seems in point with the present case, was a decision of Lord Cottenham's, after argument by Mr. Pemberton and Mr. Bickersteth, and a full reference to the authorities.

The reasonable conclusion is, and it is warranted by the preponderance of the authorities (when examined), that in cases like the present, where all the other conditions have been performed which make the estate absolute and indefeasible in the person to take, whether a designated person, or a class, or one of a class, the devise over does not take effect by reason of the death of the previous devisee in the lifetime of the testator. The failure of the previous estate is then due solely to lapse, or something analogous to lapse. In that case the condition upon which the ultimate limitation is to take effect is negatived by the contrary event happening. But when the failure of the previous estate is caused by the events not happening upon which it is to arise or be complete, then the ultimate limitation may come in. In the present case, for example, it would undoubtedly have come in if there had been no child of the daughter until after the making of the will. There may be a doubt what the result would have been if she had a child, and that child died under twenty-one and without issue. But in the case which has happened, viz. of there being a child, and that child attaining twenty-two, the foundation of the ultimate devise taking effect fails altogether.

In the present case the son attained twenty-one. It is worth

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(1) Law Rep. 1 Eq. 79.

(2) 4 K. & J. 603; 28 L. J. (Ch.) 70. 4 Jur NS 60

(3) 4 T. R. 706.

(4) 3 Bro. C. C. 393.

(5) 3 Bro. C. C. 395.

(6) 3 Ves. at p. 320.

(7) 4 L. J. (N.S.) Ch. 129.

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while to consider for a moment what the result would have been if he had died under age leaving issue, which is the other event by which the ultimate limitation would be defeated if it occurred after the death of the testator. If that other event had occurred, it might have deserved consideration whether s. 33 of the Wills Act (7 Wm. 4 & 1 Vict. c. 26), already adverted to, would have applied so as to prevent a lapse, and make the estate go to the issue, provided they survived the testator. If it would have applied it may be an additional reason for saying that, as the ultimate limitation would not come in if one of the events occurred in the lifetime of the testator, in like manner the other event so occurring would defeat it. But this is only an additional reason, and is not further gone into because the authorities have not been consulted to ascertain whether this section has been held to apply only where the devise is to a designated person. If, therefore, it were necessary to decide the case upon the first question, we should do so in favour of the plaintiff, on the ground that the ultimate limitation did not take effect.

But the other question, viz. the effect of the ultimate limitation, was fully argued before us, and it is right, therefore, that an opinion should be given upon it. The words of the ultimate limitation over are as follows: "In case, &c., I direct that the last-mentioned freehold messuages, lands, tenements, hereditaments, and premises shall go, remain, and be to the use of the heirs and assigns of my daughter Elizabeth Violett, as if she had continued sole and unmarried." And supposing it to take effect, the plaintiff claims under it as heir of Elizabeth Ann, as if she continued sole and unmarried, and entitled to succeed to it upon her death.

The defendant claims under a deed of appointment and conveyance, executed by Elizabeth Ann and her husband and duly acknowledged by her, and contends that either she had a contingent remainder in fee (the contingency being her having no child living at the testator's death, or born afterwards, who attained twenty-one, or had issue), or that by virtue of the words of the limitation, "heirs and assigns," she had an absolute power of disposition and appointment.

As regards the first contention of the defendant, it was suggested that the devise being to the children in fee, and if they die under twenty-one and not leaving issue, then over, the devise over must be an executory devise, and could not therefore unite with the previous life estate given to her by the will, so as by the rule in *Shelley's Case* to give her a fee; but it is conclusively settled by the case of *Evers* v. *Challis* (1), that though the express devise over, if there were children to take who died under twenty-one and without leaving issue, would be an executory devise if children survived the testator, yet the implied devise over, in case there were no children to take at all, would be a contingent remainder, and capable of uniting with the previous life estate, and produce the result mentioned. And if the devise over had been to her heirs or to the heirs of her body, she would have taken an estate in fee or an estate tail in remainder.

But there are no such words of limitation in this case. The words are, "to the heirs and assigns of Elizabeth Ann, as if she had continued sole and unmarried;" these words prevent her own son, if she married a second time and had one, from succeeding. This makes the rule in *Shelley's Case* inapplicable for want of proper words of limitation. Indeed, the main reliance of the learned counsel was not placed upon the application of the rule in *Shelley's Case* but upon the effect of the word "assigns" following the word "heirs" in the ultimate limitation; and he contended that the effect of the words "heirs and assigns" was to place the property, subject to the previous interests, at her disposal, and subject to her appointment. In favour of that conclusion some authorities were referred to: a dictum of Willes, C.J., in *Tapner* v. *Merlott* (2), that those words might possibly receive such a construction; *Attorney-General* v. *Vigor* (3), where Lord Eldon thought a power of appointment might be implied upon the very complicated settlement made by Sir George Downing upon the marriage of his son, though as this power was not executed no decision was founded upon it; and especially reliance was placed upon the case of *Quested* v. *Michell* (4), where Vice-Chancellor Kindersley held, that upon an ultimate legal limitation of real and personal estate to the heirs, executors, administrators, and assigns of a previous equitable devisee for life (the rule in *Shelley's Case* being obviously inapplicable), the effect of the limitation was to give a power of appointment to the devisee, with a remainder to the heirs of the devisee at her death in default of appointment.

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(1) 7 H. L. C. 531.

(2) Willes, 177.

(3) 8 Ves. 256.

(4) 24 L. J. (Ch.) 722. 1 Jur NS 408

The learned judge does not consider it by any means a clear case, and founds his conclusion upon particular considerations, which are adverted to. Without saying anything to impeach the correctness of that decision, we think that in construing the present will the words "heirs and assigns," coupled with the words "as if she continued sole and unmarried," and with the other dispositions of the will, ought not to be construed as conferring a power of appointment upon Elizabeth Ann. In general the words "and assigns" following the word "heirs" have now no operation. At an early period of our legal history a feoffment or conveyance to a "man and his heirs" only gave the right of enjoyment to a man and his heirs in succession, with no power of alienation. The subject is clearly explained in the case of *Burgess* v. *Wheate.* (1) After shewing the original effect of a conveyance to a man and his heirs, the Master of the Rolls proceeds: "The next step in favour of the tenant was to aliene without licence, for which purpose a larger grant was necessary, viz. to his heirs and assigns." And he afterwards shews how the complete power of alienation was acquired, if a man had his estate limited to him and his heirs. And the result is well expressed by Mr. Williams, in his work on the principles of the law of real property. Speaking of the usual limitation to a man, his heirs and assigns for ever, he says: "The words 'to assigns for ever' have, at the present day, no conveyancing virtue at all, but are merely declaratory of that power of alienation which the purchaser would have without them:" Williams on Real Property, 8th ed. p. 141.

In the present case there does not appear to us to be any sufficient reason for holding the words "heirs and assigns" as conferring anything but an estate or interest. There are several reasons for this conclusion. In the first place, in the immediately preceding devise to the children, the same words, "heirs and assigns," are used in the ordinary conveyancing sense, and in general the same sense is attributed to a word repeated in the same instrument. Secondly, in the corresponding clause in the settlement which the

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(1) 1 W. Bl. 123.

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will is to carry into effect, the word "assigns" is omitted, and the property, freehold and leasehold, is to be limited to the heirs and administrators (according to the tenure and quality of the property) of the said Elizabeth Ann as if she had died sole and unmarried. It would be going very far to conclude from such a change of language as the usual introduction of the word "assigns" after the word "heirs," that between the settlement and the will which was to carry the settlement into effect, the testator had changed his mind as to the ultimate disposition of the property in favour of the daughter. Thirdly, the words "as if she had died sole and unmarried" in the settlement, can have no meaning except as indicating the person who is to take, and they ought to have the same meaning in the will, and not be applied to the word "assigns" as indicating the extent of control over the property. Fourthly, although it is a good general rule, as laid down in the case of *Quested* v. *Michell* (1) by Vice-Chancellor Kindersley, that in construing instruments effect is to be given to each word; yet this rule has little application to a word like the word "assigns" following the word "heirs," which in that connection generally has no meaning. Fifthly, the words in the settlement are, "as if she had died sole and unmarried;" in the will, "as if she had continued sole and unmarried." There does not appear any reason for supposing that the two forms of words are intended to have different meanings. But the words used in the settlement, "as if she had died sole and unmarried," can have no meaning except as indicating the person who is to take as heir. It would hardly be sense to say that Elizabeth Ann should have the same power of appointment to assigns, as if she died sole and unmarried. If the words, then, are to be read in the settlement and in the will with the same meaning, they can refer only to the word "heirs" in the sentence, and not to the word "assigns." Lastly, the construing the limitation in the sense in which Vice-Chancellor Kindersley construed the limitation in *Quested* v. *Mitchell* (1), and which he considered clearly gave effect to the intention of the testator as apparent upon the will, would in the present case be opposed to that intention.

The construction of the Vice-Chancellor was, that the person

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(1) 24 L. J. (Ch) 722. 1 Jur N.S. 488

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named should have the power of appointment over the property, and that, subject thereto, it should go to the person filling the character of heir at her death. Now, in the present case the testator was by his will really making a settlement upon the marriage of his daughter, and certainly, by the provisions in the will, shews he had no intention that the husband should have any control over the property, or exercise an option to any extent, whether the heir of his daughter should succeed or not. But by giving the daughter the complete power of disposition, and so defeating the heir, the husband has practically, by his influence some control, and perhaps complete control. Other reasons might be given, but enough has been said to shew that the decision in *Quested* v. *Michell* (1) ought not to govern the present case.

For the reasons above given, we are of opinion that the ultimate limitation did not, upon the facts of this case, take effect, and that, if it did, the heir of Elizabeth Ann at her death was entitled to succeed.

Judgment for the plaintiff.

Attorneys for plaintiff: *Pitman & Lane.*
Attorneys for defendant: *Sharp & Turner.*

June 17.

[IN THE EXCHEQUER CHAMBER.]

ATTORNEY-GENERAL *v.* BLACK.

Income Tax—Liability of Local Coal Dues—Rate or Duty—5 & 6 Wm. 4, c. 35—Schedules A. and D.

S. App. Cas 9 H.

By 13 Geo. 3, c. 34, a power was given to Improvement Commissioners for Brighton to levy a duty of 6*d.* on every chauldron of coals landed on the beach or brought into the town, for the purpose of erecting and maintaining groyns, &c., against the sea. By subsequent Acts the duty was continued and increased, and by 6 Geo. 4, c. clxxix. it was, together with rates which the commissioners were empowered to levy, market tolls, &c., to form a common fund for the general purposes of the Act, which included paving, lighting, and watching, and the maintenance of groyns and other sea works:—

Held (affirming the judgment of the Court below), that the corporation (who had succeeded to the rights of the commissioners) were liable to pay income-tax in respect of the coal duty.

ERROR upon the judgment of the Court of Exchequer in favour of the Crown, on a case stated under 22 & 23 Vict. c. 21, s. 10,

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(1) 24 L. J. (Ch.) 722. 1 Jur NS 480.

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upon an information against the town clerk of the corporation of Brighton, to recover penalties for not including in the income-tax returns, required by 5 & 6 Vict. c. 35, certain duties levied by the corporation under local Acts upon all coal landed on the beach or brought within the limits of the town of Brighton. (1)

Manisty, Q.C. (*Freeman* with him), for the defendant.

Sir R. P. Collier, A.G. (*Hutton* with him), for the Crown. The same arguments were urged which had been used in the court below.

BYLES, J. After listening attentively to the arguments which Mr. Manisty has addressed to us, I am of opinion that the judgment of the Court below must be affirmed. This impost is, at all events, of the nature of a toll within the 3rd rule of Sched. A. No. III. in s. 60. With respect to its incidence one thing at least is plain. It originally falls on the persons immediately engaged in the importation of the coal. What is its ultimate incidence it may be difficult to ascertain precisely; but at least it falls on strangers as well as on the inhabitants of the place. As to the benefit, there is no doubt who take it; it is taken solely by the tax-payers of Brighton, who have an entire discretion as to its application. On these grounds I entertain no doubt that the proceeds of the impost are liable to income-tax.

BLACKBURN, J. I am of the same opinion. The question is as to the construction of 5 & 6 Vict. c. 35. [The learned judge referred to s. 60, Sched. A., and s. 100, Sched. D., and proceeded:—] The words in this latter section are very extensive. My Brother Martin says, "It seems impossible that any net could be extended more widely; every possible source of income seems included." (2) Not, however, that every kind of income derived by a corporation, in whatever way it may come to them, would be included in it. They would not be liable except in respect of something of the same nature and kind as what had been previously mentioned; not, for instance, in respect of a

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(1) Reported ante, p. 78, where the facts are fully stated.

(2) Ante, p. 85.

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borough rate, a poor-rate, or a highway rate, because these are not within the analogy of the "property or profit" previously described. The question, then is, whether this particular income does come within the description of "property or profit;" and after listening attentively to the arguments for the appellants, I have come to the conclusion that it does.

The mention of "rights of markets and fairs" and "tolls" in Sched. A., No. III., shews the intention of the legislature to include in the general sweeping words of Sched. D, sources of income similar to these. Harbour and port dues therefore, originally granted to the owners of the ports, being ejusdem generis with market dues and tolls, would be included in those general words. The question therefore is, whether the rate or duty in this case is of the same sort or kind as harbour or port dues.

I observe, in passing, that the fact of the proceeds of the rate being brought into a common fund, which also includes other kinds of income that are not subject to income-tax, does not affect the question; for the true principle is that adopted in *Mersey Docks and Harbour Board* v. *Cameron* (1), that if the fund is in its nature subject to taxation, it remains so subject, notwithstanding its proceeds are to be applied to public purposes, and the proceeds which are to be so applied are what remain after discharging the burden to which it is subject. That circumstance therefore furnishes no ground of distinction.

Taking this rate or duty then independently of that consideration, it is strictly ejusdem generis with tolls and dues granted by the Crown to the private owner of a market, or harbour, or port, upon all goods sold or brought to land. Till recently, a very large sum, amounting to about 14,000*l.*, was yearly received by the Corporation of Liverpool for port dues (now transferred to the Mersey Harbour Board), and it is very clear that this income would have been liable to taxation as ejusdem generis with tolls, or at all events as property. The rate or duty which has been granted to the Corporation of Brighton is equally so, and is caught by the net spread by s. 100.

Keating, J. I am of the same opinion. The argument has been brought within a narrow compass. Mr. Manisty does not contend that harbour and port dues, and other revenues of that description, are not taxable; and the Attorney-General admits that a district rate is not. The question then is, does the rate in question partake more of the nature of the one or of the other? I am of opinion that it does not partake of the character of a district rate imposed by the inhabitants of a place upon themselves; and that on the other hand, it is very difficult to distinguish it from harbour dues. I agree, therefore, in thinking that it is subject to income-tax; and I also agree that the purpose to which it is applied cannot affect the question of its liability to the tax.

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(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur. N.S. 746

Mellor, J. I am of the same opinion. To determine the question of liability, we must consider the source of the income. The rate from which it is derived was granted as a consideration for the repair of the groyns, and is in the nature of harbour dues, much more than in the nature of a district rate. It is levied in the first instance on those who import the coal, whatever the ultimate incidence of the tax may be. That it is thrown into a common fund with other sources of revenue which are not taxable cannot alter the question, which depends upon its character when received.

Montague Smith, J. I am of the same opinion. Everything has been urged that could be, but not enough to impeach the judgment of the Court below. I agree that the purpose to which the rate is applied cannot be taken into consideration, if in its nature it is a property or profit; it can only be looked on as one of the circumstances which determine whether it is more in the nature of a tax or of a toll.

Lush, J. I also am of opinion that this is a profit within the meaning of the Income Tax Act; and I think there is an essential distinction between these dues and a district rate. This impost has been granted by Parliament to the Corporation of Brighton on the importation of coals; it is paid by the importer upon importing them, without any act of the corporation, and whether it is required by them or not; for clearly no shipowner could refuse to pay it on the ground that it was not needed. It is then a due

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or a debt, payable so long as the Act of Parliament continues in force, whereas a rate is a call made by the local authority on a given class of inhabitants from time to time as occasion requires. For these reasons I think this is not in the nature of a tax, but of a property or profit.

Judgment affirmed.

Attorney for the Crown: *The Solicitor of Inland Revenue.*

Attorneys for defendant: *Tilleard & Co.*, for *D. Black, Town Clerk, Brighton.*

June 12.

KENT *v.* THOMAS.

Proof in Bankruptcy—Contingent Liability—Bankruptcy Act, 1849, *ss.* 177, 178.

7 Ch 40

A bond for 1000*l.* was executed by the defendant to the plaintiff, subject to a condition, which recited an agreement by the defendant to sell to the plaintiff 1100*l.* consols, being a sum to which the defendant's wife was entitled on the death of her mother, E. P., and an assignment of the same to the plaintiff by a deed of same date; and also recited that the defendant's wife might survive him and refuse to confirm the assignment; or that the plaintiff might, through defendant's default or otherwise, never realize the benefit of the same; the condition being that, if the defendant should, within six months after the death of E. P., obtain the transfer of the said sum of consols, or if the trustees thereof should, within six months after the death of E. P., transfer the same to the plaintiff, his executors, administrators or assigns, the bond should be void.

The defendant became bankrupt under the Bankrupt Acts of 1849 and 1861, and before the expiration of six months after the death of E. P., he obtained his discharge. In an action on the bond commenced after the defendant obtained his discharge:—

Held, that the defendant was not discharged from his liability on the bond.

DECLARATION on a bond for 1000*l.*

Plea, setting out the condition of the bond, which recited that the defendant had agreed with the plaintiff for the sale to him of 1100*l.* Three per Cent. Consols, being one-fifth of 5,500*l.* consols, to which Mary Ann, the wife of the defendant, was entitled upon the death of her mother, Elizabeth Price, under the will of Robert Brown, deceased, which fifth part was, by a deed of assignment of even date assigned to the plaintiff, his executors, administrators and assigns; and also recited that Mary Ann Thomas might survive her husband and refuse to confirm the assignment; or that the plaintiff might, through the default of the defendant or otherwise, never realize the benefit of the same; the condition being, that if the defendant should, within six months after the death of Elizabeth Price, obtain the transfer of the said fifth part; or if the trustees of the sum of 5,500*l.* consols, or the share of the said Mary Ann Thomas, should, within six months after the death of the said Elizabeth Price, pay, transfer, or assign the said share to the plaintiff, his executors, administrators or assigns, then the above-written obligation should be void. The plea further alleged, that after the making of the bond, and the passing of the Bankruptcy Act, 1861, but before the passing of the Bankruptcy Act, 1869, before action the defendant became bankrupt, and received his order of discharge.

Demurrer.

Replication: that at the time of the bankruptcy and discharge, no breach of the condition of the bond had happened, and that the bankruptcy took place and the order of discharge was obtained before six months after the death of Elizabeth Price.

Demurrer.

R. V. Williams, for the plaintiff. The bankruptcy of the defendant is no answer to the action, for the bond created neither a "debt payable on a contingency" within the 177th section of the Bankruptcy Act, 1849, nor a "liability to pay money on a contingency," within the 178th section of the same statute. It could not have been proved under s. 177, for under that section the proof is to be immediate, and the claim must be capable of estimation. But before breach it would have been impossible to put a value on the plaintiff's claim. Whether it would ever arise, depended on a double contingency, the survival of the wife, and her refusal to confirm the assignment. It might never arise at all, and on this ground alone was not capable of estimation. But further, it was not a debt at all. It was in the nature of a claim for unliquidated damages to be assessed for breach of the condition. This is so apart from the 8 & 9 Wm. 3, c. 11, s. 8, which perhaps only applies where breaches of several covenants are contemplated; at common law (as the language of the statute appears to indicate)

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in an action on a bond conditioned to be void in case of non-performance of a single covenant, the jury would have assessed only the damages actually sustained, *White* v. *Sealy* (1). The defendant, therefore, must contend that the plaintiff's claim was in respect of a "liability to pay money on a contingency" within s. 178. But, firstly, the event is not shewn to have happened within six months. Secondly, under that section also, it is necessary that the contingency should be single, and the claim capable of estimation; and these two conditions, of which the former is in effect a branch of the latter, have been held equally essential, and, on the same reason, under the Bankruptcy Act of 5 Geo. 2, c. 30, *Alsop* v. *Price* (2); under ss. 177 and 178 of the Act of 1849, *Warburg* v. *Tucker* (3); *Hopkins* v. *Thomas* (4); *Mitcalfe* v. *Hanson* (5); and under s. 154 of the Bankruptcy Act, 1861, and s. 75 of the Companies Act, 1862, *Ex parte Pickering* (6); *Hastie's Case* (7). The case of *Cary* v. *Dawson* (8) is a direct authority upon the point here raised, and illustrates both s. 178 of the Act of 1849, and s. 154 of the Act of 1861.

Horne Payne, contrà. *Cary* v. *Dawson* (8) was an action for contribution; and the claim arose not because the defendant had broken his contract with the plaintiffs, but because he failed to perform the legal duty implied from his relation of co-suretyship with them; the claim, therefore, was in the nature of a claim for damages. It was also a claim arising out of a duty not to pay money but to replace consols, and on this ground it may be distinguished from *Adkins* v. *Farrington* (9), where it was held that the right of one co-surety upon a promissory note against his co-surety was barred, a decision which agrees with *Saunders* v. *Best* (10). The present case is, in fact, the case of a debt payable on a contingency; the bond is not within 8 & 9 Wm. 3, c. 11, s. 8, and might, under the old law, have been proved in bankruptcy after forfeiture; and might, under s. 178 of the Act of 1849, be proved before forfeiture. This distinction between a claim for damages and a debt has always been observed; in the former case proof was never allowed until the Act of 1861 (s. 153): *Boorman* v. *Nash* (1); *Green* v. *Bicknell* (2); *Young* v. *Winter* (3); in the latter proof was allowed, and in this class were reckoned, before the Act of 1849, bonds which had been forfeited before bankruptcy, though conditioned to secure future payments: *Wyllie* v. *Wilkes* (4); *Staines* v. *Planck* (5); *Sammon* v. *Miller* (6); *Ex parte Day* (7); *Ex parte Fisher* (8); see also *Ex parte Barker* (9); and under that Act proof may equally be made in respect of bonds not yet forfeited, or covenants which relate to future payments: *Young* v. *Winter* (3). The same principle has been applied to guaranties: *In re Willis* (10); which decision was followed by Knight Bruce, V.C., in *Ex parte Brook* (11), in conformity with his own opinion, expressed though not acted upon in *Ex parte Meyer* (12), and was also approved and followed by the Lords Justices in *Ex parte Barwis* (13). These cases have overruled the previous decisions upon which *Ex parte Meyer* (12) was founded: Griffith & Holmes on Bankruptcy, vol. i., p. 577; and they are entirely in favour of the defendant here. The cases of *South Staffordshire Ry. Co.* v. *Burnside* (14) (decided under 6 Geo. 4, c. 16); and *Mudge* v. *Rowan* (15), are distinguishable upon the ground pointed out in *Mitcalfe* v. *Hanson* (16), that there the obligation was to the continuance of a payment, not to the payment in the future of a single liability; and they do not involve the proposition that a claim, in order to be proveable, must be capable of an exact estimation, a proposition inconsistent with *In re Willis* (10).

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(1) 1 Doug. 49.

(2) 1 Doug. 160.

(3) E. B. & E. 914; 28 L. J. (Q.B.) 56. 4 Jur. N.S. 1162.

(4) 7 C. B. (N. S.) 711; 29 L. J. (C.P.) 187.

(5) Law Rep. 1 H. L. 242.

(6) Law Rep. 4 Ch. 58.

(7) Law Rep. 4 Ch. 274.

(8) Law Rep. 4 Q. B. 568.

(9) 5 H. & N. 586; 29 L. J. (Ex.) 345.

(10) 17 C. B. (N. S.) 731. 10 Jur. N.S. 1204

R. V. Williams, in reply. *In re Willis* (10), and *Ex parte Barwis* (13), are distinguishable on the ground that there was a certain subsisting debt in respect of which the guarantie was given;

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(1) 9 B. & C. 145.
(2) 8 Ad. & E. 701.
(3) 16 C. B. 401; 24 L. J. (C.P.) 214.
(4) 2 Doug. 519.
(5) 8 T. R. 386. *Per* Lord *Kenyon*, C.J., at p. 389.
(6) 3 B. & Ad. 596.
(7) 7 Ves. 301.
(8) Buck. 188.
(9) 9 Ves. 110.
(10) 4 Ex. 530; 19 L. J. (Ex.) 30.
(11) 6 D. M. & G. 771.
(12) 6 D. M. & G. 775.
(13) 6 D. M. & G. 762; 25 L. J. (Bkr.) 10. 2 Jur N.S. 5.
(14) 5 Ex. 129; 20 L. J. (Ex.) 120.
(15) Law Rep. 3 Ex. 85.
(16) Law Rep. 1 H. L. 242.

(V.C. 1 Jur N.S. 960

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they do not tend to establish the principle that a claim may be proved which cannot be estimated; and the contrary is established by *Brett* v. *Jackson*(1); *Mudge* v. *Rowan*(2): and *Parker* v. *Ince*(3). The claim on this bond, notwithstanding its form, can only be for the amount of damage suffered by non-performance of the condition; that is all which equity would allow to be enforced, or which the Court of Bankruptcy, administering both law and equity, would recognize as the claim; and that claim is, until breach, wholly uncertain.

Bramwell, B. I think the plaintiff is entitled to our judgment. Whether he will establish his claim to £1000, or whether he will be only entitled to such a sum as the jury may find to be the damage sustained by him by reason of the non-performance of the condition of the bond, we need not decide. For whether the bond is or is not within the statute of 8 & 9 Wm. 3, c. 11, it is in neither case within either s. 177 or s. 178 of the Bankruptcy Act, 1849. As to s. 178, it appears to me that the opinion I expressed in *Warburg* v. *Tucker* (4) is correct; and, indeed, the defendant's counsel finds it difficult to say that the present liability was proveable under that section as a "liability to pay money upon a contingency," unless, assuming the plaintiff to have a right to recover upon the bond as a debt, it were proveable as a "debt payable on a contingency," under s. 177. Assuming, then, s. 177 to be the material section, to bring a debt within it the debt must necessarily be one susceptible of valuation. Here I think (not forgetting the decision of *In re Willis* (5)) there was not a debt payable on a contingency within the meaning of the section. By that section the right of the creditor claiming to prove is, to "apply to the Court to set a value upon such debt, and the Court is hereby required to ascertain the value thereof." This assumes that the debt is of such a kind that the Court can set a value upon it. Whether *In re Willis* (5) was rightly decided, or whether it is distinguishable on the ground that the liability to pay was there absolutely certain, for that the original debtor, being insolvent, would pay nothing, it is not necessary to determine. If not distinguishable, it has been certainly overruled by more recent decisions, which have settled that the debt must be capable of valuation. Is there, then, such a debt? We have not very ample materials before us, but we must take into account the contingencies which appear upon the pleadings. If the only one had been the duration of the life of Mrs. Price, it might have been calculated on the principles adopted by insurance companies. But there was also the contingency of survivorship. If the defendant survived his wife and Mrs. Price, he would have been entitled, as his wife's representative, to the fund, which would then have passed to the plaintiff as his assignee, and with a title enforceable against the trustee. But if the wife survived the husband she would be entitled to claim the fund; or, if they both survived Mrs. Price long enough to entitle the plaintiff to claim to have a transfer of the fund, and a bill was filed against the trustees to obtain possession of it, the wife's equity to a settlement would arise, and the sum to be settled would depend on the view which the Court of Chancery took of the circumstances of the family. Another possibility occurs; suppose the bankrupt, after obtaining his discharge, to die worth 20,000*l.*, and to make his wife executrix and sole legatee, and suppose that consols had in the meantime fallen to 80, so that the stock became of less value than 1000*l.*; she might elect to transfer the stock rather than to pay the 1000*l.* Taking into account all these contingencies, I cannot see how this liability could possibly be valued; and since to make it proveable it is necessary that it should be capable of valuation, the claim is neither within s. 177 or s. 178 of the Bankruptcy Act, 1849.

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(1) Law Rep. 4 C. P. 259.

(2) Law Rep. 3 Ex. 85.

(3) 4 H. & N. 53; 28 L. J. (Ex.) 189.

(4) E. B. & E. 914, at p. 926; 28 L. J. (Q.B.) 56, at p. 59. 4 Jur. N.S. 1145

(5) 4 Ex. 530; 19 L. J. (Ex.) 30.

CHANNELL, B. I also am of opinion that this liability is within neither of the two sections, 177 and 178. It cannot be treated as within s. 178, for there is nothing to shew that the event happened within six months after the bankruptcy. Looking at the case, then, with reference to s. 177, I think it is not a "debt payable on a contingency" within the meaning of that section. If the case could not be distinguished from *In re Willis* (1), there might be some difficulty; but that case is distinguishable;

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(1) 4 Ex. 530; 19 L. J. (Ex). 30.

and, laying it aside, the more recent decisions have clearly settled, that where a valuation of the claim is impracticable there can be no proof; a principle wholly inconsistent with the conclusion which we are desired to adopt as established by that case. This is not a liability which there may be merely some difficulty in estimating; but to estimate it is substantially impracticable. The right to prove in respect of debts not immediately payable depends entirely on the express provisions of the statute; and it must be clearly made out that that right exists before the corresponding relief of the debtor can be established.

PIGOTT, B. I am of the same opinion. It is admitted that the case does not fall within s. 178. Is it, then, within s. 177? To be so it must be capable of valuation. This appears plainly from the provision of the section, that the Court shall set a value upon it, for the legislature cannot have intended to fasten on the Court an impossible task. Now, however this bond is looked at, whether as giving rise to a claim for damages or to a debt, the contingencies which must be looked at when you try to ascertain its value are so numerous and so uncertain in their character, that it is impossible to solve the question of the amount for which the creditor should be admitted to prove. This plainly appears from the contingencies which my Brother Bramwell has stated; and in deciding against the defendant, we are following the rule which the cases have clearly established.

Judgment for the plaintiff.

Attorneys for plaintiff: *Brooksbank & Gallard.*
Attorneys for defendant: *Blake & Hughes.*

[IN THE EXCHEQUER CHAMBER.]

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June 20.

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16 Aff Cas 22
229, 231
249, 252.
719-

Ship and Shipping—Charterparty—Payment on account of Freight.

Payments made in advance on account of freight cannot be recovered back, although the vessel is lost.

The plaintiff chartered a vessel to the defendants for a homeward voyage from Calcutta, with an option to the defendants to send the vessel on an intermediate voyage at a freight therein mentioned: "such freight to be paid as follows:—1200*l.* in rupees to be advanced the master by the freighters' agents at Calcutta against his receipt, and to be deducted, together with $1\frac{1}{4}$ per cent. commission on the amount advanced and cost of insurance from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge, in cash as customary." By another clause the master was to "sign bills of lading at any current rate of freight required, without prejudice to the charterparty; but not under chartered rates, except the difference be paid in cash."

The defendants elected to send the vessel on the intermediate voyage, and paid the 1200*l.*, but induced the master, whom they required to sign bills of lading below the chartered rates, to postpone payment of the difference till the cargo was complete. The difference was not paid, and the vessel was lost on her way out to sea. In an action for the difference:—

Held (affirming the judgment of the Court below), that the plaintiff was entitled to recover.

ERROR on a special case stated in an action on a charterparty, dated the 4th of February, 1868, by which the plaintiff's ship *Daphne* was chartered to the defendants for a voyage from Calcutta to London or Liverpool (1).

By the charterparty the freighters were to have the option of sending the vessel on an intermediate voyage, at a named rate of freight. "Such freight to be paid as follows:—1200*l.* in rupees, to be advanced the master by the freighters' agents at Calcutta against his receipt, and to be deducted, together with $1\frac{1}{4}$ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge, in cash as customary."

It was also provided as follows:—"The master to sign bills of lading at any current rate of freight required, without prejudice to the charterparty; but not under chartered rates, except the difference is paid in cash."

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(1) Reported, ante p. 20.

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The defendants elected to send the ship on the intermediate voyage, and required the master to sign bills of lading at rates under the chartered rates; and they induced him to do so, without receiving the difference in cash, on the assurance that all would be made right when the vessel had finished lading. The difference, however, was not paid, and the vessel was lost on the voyage.

This action was brought to recover the difference, amounting to 737*l.* The Court below gave judgment for the plaintiff, and the defendants brought error.

Butt, Q.C. (*Baylis* with him) for the defendants (1). The substantial question in this case is whether a prepayment of freight is final, or whether it can be recovered back if the goods are lost, and the freight therefore never earned. The true doctrine is that it can be recovered back, unless there is a distinct indication of a contrary intention. That this is the old and well-established doctrine in general mercantile law is clear; and it is the rule which is adopted in all the European codes. It is thus stated by Kent, C.J., in *Watson* v. *Duykinck* (2), decided in 1808. After observing that the English authorities afforded little light upon the question, the learned judge says, "Cleirac in his commentary on the judgments of Oleron, art. 2, no. 9 (Les Us. et Coûtumes de la Mer, p. 42) declares that in cases of shipwreck, the master is bound to render to the merchants the advances which they may have made upon the freight, and he cites a decision of one of the early jurists in confirmation of his doctrine: Naufragio facto exercitor naula restituit quæ ad manum perceperat, ut qui non trajecerit. The ordinance of the marine (tit. du Fret, art. 18) recognizes the ancient rule, and ordains, that if goods be lost by the perils of the sea the master shall be holden to refund the freight which had been previously advanced to him, unless there be a special agreement to the contrary. This agreement, according to Valin (Com. sur l'Ord. tom i. p. 661) always contains an express stipulation that the money advanced shall be retained in any event which may happen in the course of the voyage. The policy of the general rule on this subject was to take away the temptation to negligence or misconduct, which the certainty of freight was calculated to produce in the master. I ought, perhaps, to observe that there is a dictum of Saunders, C.J., stated in an anonymous case in 2 Show. 283, which would seem to imply that advance money for freight was in no event to be refunded; but I do not place reliance upon that very imperfect report in opposition to the explicit opinions of the writers who have been mentioned. The general principle undoubtedly is, that freight is a compensation for the carriage of goods, and, if paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail." In a note to this case it is said, "Roccus is also of opinion that freight paid in advance must be refunded if the ship is lost during the voyage, or is prevented by any sinister accident from arriving at her port of destination: Naulum seu vectura non debetur, si locator navis propter amissam navim vel alium casum in eam contingentem iter non fecerit; imo si solutum fuerit repetitur. De Nav. et Naulo not. 80. This doctrine he derives from the Digest (lib. 19, tit. 2, l. 15, § 6)." It may be added, that Roccus, at the place cited, gives an instance which exactly bears out the general principle so stated. The case of *Watson* v. *Duykinck* (1) was a strong case, because it was there found as a fact that it was the custom of New York (the port of shipment) that passage money was not refunded. This rule has been uniformly followed in America. In *Griggs* v. *Austin* (2), decided in 1825, it was adhered to by Parker, C.J.; and in *Pitman* v. *Hooper* (3), where the point decided was that seamen's wages were payable out of whatever freight there was to pay them, Story, C.J., says, "in the ordinary case of freight paid in advance, I do not understand that if the voyage is not performed the owner can, without an express stipulation to the purpose, retain it; but the shipper is entitled to recover it back. . . . I am aware that some of the English cases look the other way; and, whilst they seem to admit the doctrine, fritter it away upon very nice distinctions." More recently the same doctrine was laid down in *Minturn* v. *Warren*

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(1) The argument was commenced in Hilary Term, but the Court being differently constituted, it was now recommenced.

(2) 3 Joh. R. 335, at p. 339

(1) 3 Joh. R. 335.
(2) 3 Pick. R. 20.
(3) 3 Sumn. R. 50, at p. 66.

Insurance Company (1), and *Benner* v. *Equitable Safety Insurance Company* (2); in the former case it was decided that the shipper of goods *had no* insurable interest in advanced freight, the words of the bill of lading being, "paying freight for the said coal, nothing; sixteen dollars per ton being prepaid in New York;" and in the latter, it was held that, the shipowner *had* an insurable interest on freight, without any deduction for cash advanced, notwithstanding it was so advanced under a provision in the charterparty, that cash should be furnished to the captain at cost and free of commission. The same rule is adopted in the Code de Commerce, art. 302, as well as in other European codes (3). See also Parsons on Shipping vol. i. p. 210.

In England the law has been laid down in the same way by Lord Ellenborough, in *Mashiter* v. *Buller* (4), decided in 1807; and by Lord Abinger, in *Leman* v. *Gordon* (5); and the general principle that freight only becomes due by performance of the voyage was clearly stated in *Blakey* v. *Dixon* (6). The last cited case shews the true nature of a payment in advance where it is stipulated that it shall not be returned; it is not properly freight, but a payment made for taking the goods on board; and this shews the necessity of a clear indication of intention that the payment shall be of that nature. Accordingly in *Manfield* v. *Maitland* (7) it was held that a charterer had not an insurable interest in cash advanced to the captain under the charterparty; but it must be admitted that in that case there was nothing to connect the advance with the freight, which was all to be paid on delivery, half in cash and half in bills. The only case which appears to authorize in an unqualified way a contrary rule is the anonymous case in 2 Show. 283; but the facts of that case are not given, and all that is stated on this point is that Saunders, C.J., laid it down on the trial at Guildhall that, "advance money paid before, if in part of freight and named so in the charterparty, although the ship be lost before it come to a delivering port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money;" from the form in which this is put, as well as from the two previous holdings in the case, it appears that the action was for wages, and may probably have been so decided out of favour to a claim of that nature; the question of the right to retain the advanced freight only arose indirectly. In *Andrew* v. *Moorhouse* (1), (1814), advanced freight was held not recoverable; but there the shipper had elected to pay in London, the port of shipment, at a lower rate of freight, which was held an indication of intention that he should take the risk. In *De Silvale* v. *Kendall* (2) the shipper also failed in his action for the advances which were described as part of the freight, and were stipulated by the charterparty to be made "free of interest and commission," those words being held to indicate that the advance should not be a loan; and Lord Ellenborough said (3): "If the parties have chosen to stipulate by express words, or by words not express but sufficiently intelligible to that end, that a part of the freight (using the word freight) should be paid by anticipation, *which should not depend upon the performance of the voyage*, may they not so stipulate?" The case must be taken with reference to the words used by Lord Ellenborough; that there must be some indication that the payment "should not depend upon the performance of the voyage;" and such indications appear in all the cases where advanced freight has been retained. In *Saunders* v. *Drew* (4) the ship was to be refitted for the homeward voyage on account of which the freight was to be advanced, and a specific portion of the homeward freight was to be paid on that account; in *Hicks* v. *Shield* (5) stress was laid on the fact that the charterer was to insure the advanced freight; and *Frayes* v. *Worms* (6) was decided on the same principle. Admitting, therefore, that the English rule to this extent differs from the rule of foreign law, that express words are not necessary; yet none of the cases shew that some distinct indication of in-

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(1) 2 Allen R. 86.

(2) 6 Allen R. 222.

(3) See Italian Codice di Commercio (1866), art. 409 (the same with art. 332 of the Codice Albertino of 1842); Spanish Codigo de Comercio, art. 787; German Handelsgesetzbuch, art. 618; Dutch Code, art. 482. No corresponding provision is inserted in the New York Civil Code: see the sections on Freightage, ss. 1115–1125.

(4) 1 Camp. 84.

(5) 8 C. & P. 392.

(6) 2 B. & P. 321.

(7) 4 B. & Ald. 582.

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(1) 5 Taunt. 435.

(2) 4 M. & S. 37.

(3) At p. 42.

(4) 3 B. & Ad. 445.

(5) 7 E. & B. 633; 26 L. J. (Q.B.) 205. 3 Jur. N.S. 7[illegible]

(6) 19 C. B. (N.S.) 159; 34 L. J. (C.P.) 274 (nom. *Trayes* v. *Worms*).

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tention is not necessary, although the rule may have been sometimes laid down in terms wider than was necessary. If, however, the cases are thought to go farther, it is still open to this Court to correct them. But in the present case there is not only wanting any indication of intention that the advance shall be retained, but there is an indication to the contrary; for although it is expressly stipulated, with respect to the £1200, that the charterer shall insure, no such stipulation occurs with respect to the payment of differences. It is reasonable, therefore, to say that the intention of the parties was only to give to the shipowner a substitute for the amount of the lien which he lost by the signing bills of lading at a less rate than the charterparty freight. If so, the defendants would be entitled to recover the money back if they had paid it; and can now, to avoid circuity of action, set it off against the plaintiff's claim: *Charles* v. *Altin* (1).

[COCKBURN, C.J. (2). We are all agreed that the law is too firmly settled for us to depart from it, even in a court of appeal, that where freight is paid in advance, it cannot be recovered back. Counsel for the defendants, therefore, need only address themselves to the question of whether, upon the terms of the charterparty, the payment here was a payment on account of freight. We cannot shake the general principle, but we are not disposed to carry it any farther.]

Milward, Q.C., (*R. G. Williams*, with him) for the defendants. Without the special clause in question the charterer could not call upon the captain to sign bills of lading for any other than the chartered rates. The immediate payment of the difference is the price he pays for exercising this option. It would be inconsistent with the whole tenor of the arrangement, and especially with the words that the difference shall be "paid in cash," to construe this payment as other than an advance of freight. He cited *Kirchner* v. *Venus* (3).

Butt, Q.C., waived his reply.

COCKBURN, C.J. I am of opinion that we must affirm this judgment, on the ground that, on looking at the clause in the charterparty, the true construction is that the payment of differences under and according to it, was to be a payment on account of freight.

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(1) 15 C. B. 46; 23 L. J. (C.P.) 197. 18 Jur. 1108.

(2) After an adjournment.

(3) 12 Moo. P. C. 361.

It is settled by the authorities referred to in the course of the argument, that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity with the American doctrine and contrary to ours. In France and Germany the rule has been settled for a long time. Valin even doubts the wisdom and propriety of allowing any exception to the rule that an advance on account of freight must be repaid in the event of freight not becoming payable; and we learn from Bedarride's great work on Mercantile Law (1) that at the time of framing the Code de Commerce the question was seriously discussed whether such an exception should be introduced into the code, but that finally in favour of the principle of freedom of contract, it was inserted in art. 302, which is as follows: "Il n'est dû aucun fret pour les marchandises perdues par naufrage ou échouement, pillées

6 HL 328
9 CP 571

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(1) After referring to Valin's opinion that no such exception ought to be allowed, the author proceeds: "Cette opinion se fit jour dans la discussion du Code de Commerce. On convint facilement que l'exception anéantissait la règle, parceque toutes les fois que le capitaine reçoit une avance sur le fret on ne manque pas de stipuler que cette avance lui sera acquise quoi qu'il arrive. Mais le principe de la liberté des conventions l'emporta. On faisait d'ailleurs remarquer que les chargeurs ne sont pas moins jaloux de leurs intérêts que le capitaine des siens, qu'ils ne souscriront donc à une pareille convention qu'autant que les avantages qu'ils font se trouveront balancés par les avantages qu'ils se procurent."—Bedarride Com. on the Code de Commerce, vol. ii. p. 436. Valin, after expressing the opinion above referred to, adds that the stipulation has nevertheless become "comme de style" on Canadian voyages and in charterparties to the Crown. (Valin, Com. sur l'Ord. vol. ii. p. 661).

Of the discussion referred to by Bedarride, no trace is to be found in the proceedings at the Conferences as reported in Locré, Legislation de la France, vol. xviii. pp. 255–398; see especially pp. 353, 355, 368, 378.

Art. 18 of the Ordonnance is in substance the same with art. 302 of the Code.

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par des pirates ou prises par des ennemis. Le capitaine est tenu de restituer le fret qui lui aura été avancé, s'il n'y a convention contraire." But whatever may be the true principle, I quite agree that the authorities founded on the ill-digested case in Shower (1), are too strong to be overcome; and if the law is to be altered, it must be done by the legislature and not by contrary decisions.

That being so, we must consider the clause of the charterparty in question, to see whether the payment required by it to be made in the event of the master being called upon to sign bills of lading at a lower rate than the charterparty freight, was intended to be a final and conclusive payment on account of freight, or whether this obligation was merely introduced with the view of making good the loss of lien which would be so caused. Now though I should be glad to think that we could take the case out of a general rule with which we are not satisfied, yet, when we look at the words of the charterparty, we must hold that the former is the true construction. I am much struck with the use of the word "paid;" and I agree that this payment primâ facie means payment on account of the freight to which the shipowner would be entitled if the goods reached home. The shipowner was entitled to payment according to the rates stipulated for in the charterparty. But if the charterer finds that he cannot get those rates, he has secured to himself an option of calling upon the master to sign bills of lading for conveyance of the goods at a lower rate; the shipowner, on the other hand, has said "by doing so, the security which I have by my lien on goods at freight is endangered; if, therefore, you require this to be done, I, on the other hand, say I shall expect you to pay me the difference at once, and to pay it once for all." There is nothing unreasonable or savouring of extortion in saying that if the reduced rate of freight is to be signed for, the difference shall be paid at once, and that part of the rate of freight originally stipulated for wiped out of the transaction. Looking at the fact that the charterparty contains nothing expressing any intention that this payment should be a mere substitute for the lien, and nothing inconsistent with this payment being an advance on account of freight; I cannot come to any other conclusion than that the parties have agreed that this payment should be a payment on account of freight, and so struck out of the transaction. When we have reached this conclusion the case falls within the general rule. Therefore, not having been paid at all, inasmuch as if it had been paid it could not have been recovered back, the plaintiff is now entitled to recover it.

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(1) Anon. 2 Show. 283.

BYLES, J. If we were at liberty to decide the case independently of authority we might be glad to arrive at a different conclusion. But the current of authority, though arising from a somewhat scanty spring, has become too strong to be resisted; it is so strong as to be binding upon us here even in a court of appeal; probably even binding on the House of Lords. I think, therefore, that the judgment must be affirmed, and will add nothing to the reasons which have been given by the Lord Chief Justice.

KEATING, J. I am of the same opinion. It is impossible for us to act contrary to the current of authority, whether the principle was originally a sound one or not. It is no doubt unfortunate when the law of this country differs from the law which prevails in the rest of the world; but the rule on this subject is fixed, and to decide otherwise would be to disturb innumerable floating contracts which have been entered into on that footing. The only question therefore is, whether the present case ranges under the class of cases where there is a payment on account of freight. I think it does, and that it was clearly the intention of the parties that this should be a payment in any event, a payment which should be absolute and not liable to be affected by the loss of the goods.

MONTAGUE SMITH, J. I have felt some hesitation in coming to a conclusion from the difficulty of precisely apprehending the ground on which the English rule has been placed. I apprehend that rule to be that a prepayment of freight is not recoverable, and that it depends upon this, that there is an implied understanding that it shall be made once for all, and shall not be subject to any contingency. Foreign law requires that for this purpose there shall be an express agreement between the parties; our law, on the contrary, supposes there is an implied agreement unless it is expressly excluded. That being the foundation of the

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rule, the question is whether it was intended that the money to be prepaid here was to remain in suspense and to be kept by the shipowner only in the event of the arrival of the goods, or whether it was a payment in the nature of a prepayment of freight and not recoverable. And looking at the rule of English law which has been so long established, which the parties must be assumed to have known, and with reference to which they must be assumed to have contracted, it appears to me that they intended the difference not to remain in suspense, but to be an absolute payment as to which the shipowner should be subject to no contingency. It is clear the master could only be required to sign bills of lading at less than the chartered rate of freight by virtue of the clause, "the master to sign bills of lading at any current rate of freight required, without prejudice to the charter-party; but not under chartered rates except the difference is paid in cash;" and it seems to me that when the parties say that the payment shall be "in cash," not in bills but only in money, they indicate an intention that the payment shall not be subject to any contingency.

LUSH, J. I am of the same opinion. It is of the highest importance that a rule of commercial law established for so many years should be adhered to. I was at one time somewhat struck by Mr. Butt's argument that the payment of differences was intended only as a substitute for the loss of lien. Such a provision might be a very reasonable one; but looking at the terms in which the parties have expressed their agreement I think that is not the fair import of the words they have used; but that it was intended that this should be a payment out and out. According to the rule of our law, therefore, it cannot be recovered back.

Judgment affirmed.

Attorneys for plaintiff: *Doyle & Edwards, for H. Jones, Colchester.*

Attorneys for defendants: *Paterson, Snow, & Burney, for A. M. White, Colchester.*

JOHNSON *v.* EMERSON AND SPARROW.

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11QB.D446
— 67 [illegible]

Action for maliciously procuring an Adjudication in Bankruptcy—Reasonable and probable Cause — Debtor's Summons — Act of Bankruptcy—Stay of Proceedings—Bankruptcy Act, 1869, *s.* 6, *subs.* 6, *s.* 7.

A debtor's summons, issuing out of a county court, having been served on the plaintiff, a trader, on the 28th of March, on the 2nd of April an application was made by him to dismiss it, and on the 12th an order was made that a bond with sureties should be executed by the plaintiff, within seven days of service of the order, and an action brought to try the debt; the order also contained a stay of proceedings. The order was served on the 13th, and notice of securities was given on the 18th; but no appointment was made by the registrar, and the bond was not executed. The seven days having expired on the 20th, the creditor on the 21st presented a petition in bankruptcy, stating as the act of bankruptcy the failure of the defendant within seven days after the service of the debtor's summons to pay, secure, or compound for the debt; and on the same day he obtained ex parte the appointment of a receiver. The plaintiff was afterwards adjudicated bankrupt; the adjudication was confirmed on appeal by the chief judge in bankruptcy, but was afterwards annulled by the lord justice, on the ground that the stay of proceedings in the order of the 12th of April was absolute, and not limited to the seven days given for the execution of the bond.

Throughout the proceedings the defendant acted as the attorney of the creditor, and the order of the 12th of April, including the insertion of the limit of seven days, was drawn up by him.

In an action for maliciously, and without reasonable and probable cause, procuring the plaintiff to be adjudicated bankrupt, the jury found that the defendant acted personally and of his own accord in carrying on the proceedings; that he was actuated by malice; and that he knew, when he filed the petition in bankruptcy, that the proceedings in bankruptcy were stayed until an appointment had been made by the registrar for the examination of sureties and execution of the bond; and the verdict was entered for the plaintiff. On the argument of a rule to enter the verdict for the defendant, or for a new trial:—

Held, by Kelly, C.B., and Cleasby, B., that, an application to dismiss the debtor's summons having been made and a stay of proceedings ordered, no act of bankruptcy was committed by the plaintiff in not paying, securing or compounding for the alleged debt within seven days from the service of the summons; that the allegation of an act of bankruptcy being in fact untrue, and being (as they inferred from the evidence) either known by the defendant to be untrue, or at any rate not bonâ fide believed by him to be true, he was liable in this action; and that the error of the Court in making the adjudication did not discharge him from liability, but was only evidence from which (if the fact had been doubtful) it might have been inferred that he had reasonable and probable cause for thinking that the statement was correct.

By Martin and Bramwell, BB., that under subs. 6 of s. 6 of the Bankruptcy Act, 1869, an act of bankruptcy was committed at the expiration of the seven days from the service of the summons, the plaintiff not having paid, secured, or

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compounded for the debt (1); and that, at any rate, having regard to the decisions of the county court judge and the chief judge, and their own opinion that an act of bankruptcy had been committed, there was no evidence of want of reasonable and probable cause for presenting the petition.

By Martin, B., quære, whether under the present bankruptcy law, as regulated by the Bankruptcy Act, 1869, any action can be maintained for procuring an adjudication of bankruptcy.

By Bramwell, B., no action is maintainable where the want of reasonable and probable cause is only error in point of law; and

Quære, whether, although no adjudication ought to have been made pending the stay, the creditor had not a right to present a petition. (2)

ACTION for maliciously, and without reasonable and probable cause, procuring the plaintiff to be adjudicated bankrupt (3). The

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(1) Since decided in *Ex parte Wier*, Law Rep. 6 Ch. 875

(2) So held in *Ex parte Wier*, Law Rep. 6 Ch. 875.

(3) The declaration was as follows: That the defendants falsely and maliciously, and without reasonable and probable cause, filed a petition for adjudication in bankruptcy against the plaintiff, according to the provisions of the Bankruptcy Act, 1869, and caused and procured the plaintiff to be adjudged a bankrupt, and his real and personal estate, goods, and effects to be seized and taken from him (alleging that the adjudication was afterwards annulled); whereby and by reason whereof divers farms, dwelling-houses, and business premises of the plaintiff, that is to say, &c., were, on the 21st of April, 1870, forcibly entered into by night, and occupied by divers persons, who remained there injuring the plaintiff's property and seizing and disposing of the plaintiff's goods then being thereon for and during the period of fifteen weeks—that is to say, from the 21st of April up to the 3rd of August in the same year. (Further alleging alarm and inconvenience to the plaintiff and his family during the said period of fifteen weeks; the dispossession of the plaintiff, and the loss of certain enumerated stock, goods, and chattels; interruption during the same period of his farming and other businesses; injury to his business, and in particular to his business with certain named persons; loss of his banking balance and other debts, and of rents; loss of increased interest payable in default of punctual payment of interest on a mortgage; and legal costs and expenses).

To this the defendants pleaded: 1. Not guilty; 2. That the adjudication was not annulled upon the merits.

The adjudication was appealed against to Bacon, V.C., Chief Judge in Bankruptcy. As his (unreported) judgment in dismissing the appeal is several times referred to in the judgments of the Court, it is here given in full.

BACON, V.C. The single question in this case is, whether or not an act of bankruptcy has been committed? I don't see what the county court judge could have done other than he has done, for it is very plain that an act of bankruptcy has been committed. An order is made on the application of the debtor that the summons be dismissed on his executing a bond with sureties within seven days. Therefore he must be taken to have known, as soon as that order was pronounced, that he had seven days, and only seven days, in

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cause was tried before Kelly, C.B., at Guildhall, at the sittings after Hilary Term, and a verdict was entered for the defendant Emerson, and against the defendant Sparrow, with 1500*l.* damages.

A rule having been obtained pursuant to leave reserved, to enter the verdict for the defendant Sparrow, on the ground that there was no evidence of personal participation by him, or of malice, or of want of reasonable and probable cause; and also for a new trial, on the ground that the verdict was against the weight of evidence and that the learned judge misdirected the jury in saying that there was reasonable and probable cause, and in the construction he put

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which to do all that was required. What does he do? He waits until the 16th of April before he suggests the names of any sureties. On the 18th the objection is taken that his solicitor, Mr. Hand, cannot be a surety; and on the 19th objection is made to the other surety. Then he does nothing until the 22nd, which is after the petition in bankruptcy has been filed, and then he suggests another surety instead of Mr. Hand. It is quite clear, the seven days having elapsed, that an act of bankruptcy had been committed. It was the debtor's own fault, and his alone, that the prescribed time was allowed to elapse. He neglected, up to the 16th, to do anything; and when the objection was made to the sureties, he did not even apply to the registrar to extend the time for perfecting his security. Under these circumstances what could the registrar do? Supposing that he had neglected some part of his duty under the 162nd rule, that would not affect the case, for here the Court had decided that within seven days the sureties should be completed, and the registrar had nothing to do with fixing any other day. This is not an irregularity of which the debtor can complain, or say that any injustice has been done. He had it entirely in his own hands to give security; and I entirely concur in the view which the judge took of that part of the case. As to the act of bankruptcy being committed, it seems to me too clear to admit of any doubt.

Then it is said that this is a case of great hardship; and the debtor stated in his affidavit that he is able to pay all his debts over and over again. But this forms no ingredient in the question before me. The Court is called upon to pronounce its decision on one single point. It would be a most dangerous precedent if, after an act of bankruptcy has been committed, the Court were to go into an inquiry whether the bankrupt has or has not the means of paying his debts, and it would defeat all the objects of the law of bankruptcy. If the plaintiff has enough to pay his debts over and over again, it is very much to be regretted that he has been so ill-advised as to allow this proceeding to go on. All the other creditors would be prejudiced if I were to listen to this application, and reverse the adjudication. There is no ground whatever for it, and I dismiss the application.

The adjudication was afterwards annulled by James, L.J., on the ground that the stay of proceedings was absolute: *Ex parte Johnson*, Law Rep. 5 Ch. 741.

on the Act of Parliament and the rules and forms thereof, and on the facts of the case, it was argued on

May 5, 6, and 8, by *Parry, Serjt., Henry James, Q.C.,* and *Tapping,* for the plaintiff, and by

Huddleston, Q.C., Field, Q.C., and *Merewether,* for the defendant.

The facts and arguments are fully stated in the judgments delivered.

Cur. adv. vult.

June 7. The following judgments were delivered.

CLEASBY, B. This was an action against the defendant for falsely, maliciously, and without reasonable and probable cause, filing a petition in bankruptcy against the plaintiff, and causing him to be adjudged bankrupt and all his property to be taken from him, and the declaration sets out various heads of special damage, among others, the having the live stock taken from two farms which he was occupying, the loss of his credit as a draper, and that his tenants, whose names are given in the declaration (twelve in number) refused to pay him their rents.

The case was tried before the Lord Chief Baron, at the sittings after Hilary Term, and a verdict entered for the defendant Emerson, and against the defendant Sparrow, with 1500*l.* damages.

It will be convenient, in what follows, to call Sparrow the defendant.

An application has been made pursuant to leave reserved to set aside the verdict and enter a verdict for the defendant on the ground that there was no evidence of personal interference by Sparrow, or of malice, or of want of reasonable and probable cause, and also for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence.

The learned judge put three questions to the jury. In substance as follows:—

First. Did the defendant personally act in carrying on the proceedings, and of his own accord apart from the instructions of his client as to the steps taken? To which the answer was that he did so act.

Second. Was the defendant actuated by malice in what he did, that is, by an undue and improper motive, for instance, coercing the plaintiff, by the use of bankruptcy proceedings, into the acknowledgment of a doubtful debt in order to gratify a powerful client? To which the jury answered that he was so actuated.

Third. Did the defendant know, when he filed the petition in bankruptcy, that the proceedings in bankruptcy were stopped until an appointment had been made by the registrar for the examination of the sureties and the execution of the bond? The jury answered that he did know it.

The principal questions argued before us in this case were, whether there was evidence of a want of reasonable and probable cause for taking the proceeding of presenting the petition for adjudication, and whether there was any evidence of malice.

It was hardly contested that the part taken by the defendant was such, that if he acted without reasonable and probable cause and was actuated by malice he would be responsible in this action, though he acted only as attorney.

Everything was actually done by him which was complained of, and if he was himself under the influence of any bad motive or feeling, no one but himself would be responsible for *that*. And, therefore, if the question of malice was found against the defendant, it seems to dispose of this objection. Otherwise, there might be no redress in such a case, for the client might not act maliciously and so not be responsible, and the attorney might only use the opportunity given him by the client of doing so.

It appears to me, that the verdict of the jury in answer to the first question is not wanted to dispose of this objection. However, the verdict certainly does dispose of it, independently of the question of malice, for it cannot be said there was no evidence whatever to support it, having regard to the proceedings connected with the order of the 12th of April with the form of which the client had nothing to do, but which was afterwards made the ground for breaking off the completion of the security and at once making the plaintiff a bankrupt.

It will be convenient here to state the facts and dates.

The plaintiff was a customer of the bank of Sir Robert Harvey, at Norwich. He owed him a certain admitted bank balance, had also mortgaged some freehold property to him for 300*l.*, and there was a claim made by Sir Robert Harvey for a further sum or alleged bank balance of 453*l.* This last item was denied by the plaintiff on the ground that he had made over to Sir Robert certain bills of exchange to the same amount, which he had not indorsed or become a party to, and that the effect was that either the last mentioned balance never arose or had been satisfied.

The defendant, the solicitor to the bank, about the 14th of March, wrote to the plaintiff that unless the account was paid they would proceed in bankruptcy against the plaintiff. The solicitor of the plaintiff wrote to the defendant to say that the plaintiff denied his liability, and that he was ready to appear to any writ.

On the 26th of March, the defendant issued a debtor's summons, under the Bankruptcy Act of 1869, which was served on the plaintiff on the 28th of March.

On the 2nd of April, the plaintiff filed an affidavit in compliance with the Act, denying his liability.

On the same day, the registrar appointed the 12th of April to hear the application. On that day the parties and solicitors attended, and an order was made in the following form :—

"The Bankruptcy Act, 1869.

"In the County Court of Norfolk, holden at Norwich.

"In the matter of a debtor's summons by Messrs. Harveys & Hudsons against William Johnson. Upon the application of William Johnson to dismiss this summons, and upon reading the affidavit of William Johnson, and upon hearing Sir Robert John Harvey Harvey, Baronet, one of the firm of the said Messrs. Harveys and Hudsons, it is ordered that the said William Johnson, within seven days from the service of this order upon him, enter into a bond in the penal sum of 912*l.* 9*s.* 8*d.* with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered by Messrs. Harveys and Hudsons against the said William Johnson in any proceedings taken or continued against him for the recovery of the demand mentioned in such summons together with such costs as shall be given by the Court in which such proceedings are had.

"And it is further ordered that all proceedings on this summons shall be stayed until the Court in which the proceedings shall be taken shall have come to a decision thereon.

"Given under the seal of the Court this 12th day of April, 1870.

"By the Court,
"Thomas H. Palmer, Registrar."

It was undisputed that the order in this form was drawn up by the defendant, and was in his handwriting, and was by letter of the same date served by him upon the plaintiff's solicitor. It was sworn in the defendant's case, that the period of seven days was first mentioned by the registrar; but as the case went to the jury upon the credit of the witnesses, and they found every question against the defendant, the fact last alluded to cannot be regarded as an undisputed fact.

It was stated at the meeting on the 12th of April, that there would be no difficulty in obtaining an extension of the time for perfecting the security. This fact was proved in the plaintiff's case, and was not, I think, disputed in the defendant's. Indeed it seems to be referred to in one of the defendant's letters, viz., that of the 23rd of April.

It did not appear that any opposition was made to giving security.

It was sworn on the part of the plaintiff, that at the meeting of the 12th of April, Mr. Hand's name was mentioned as likely to be one of the sureties without any objection, but it was sworn on the part of the defendant that something was said by the registrar about the solicitor of the party being an objectionable surety.

This part of the case must be regarded as disputed, and the conduct of the parties and the correspondence is material as leading to the proper inference.

On the 16th of April Mr. Hand presented to the registrar a notice of sureties, pursuant to the 162nd of the bankruptcy rules, proposing himself and William Hardingham (describing him) as sureties; and the following correspondence passed. On the 16th of April the solicitor of the plaintiff wrote to the defendant:—

"I send you herewith notice of securities, copies of which I have also forwarded to Mr. Palmer (the registrar). I presume you will have no objection to myself and the gentleman who will join me, and I will prepare the bond and have the same sent to the registrar. I suppose you will not require any affidavit; if you do, kindly write me, and I will send same to be filed with the bond."

To which the defendant replied on the 18th: "We find that the registrar of the Norfolk County Court will in all cases upon principle decline to accept the debtor's attorney as a security for the payment of money. You will, therefore, substitute some one else for yourself, and we will make inquiries as to the other security proposed. We may add that in this case most certainly the affidavit of justification will not be dispensed with."

On the following day the defendant wrote again, objecting to the name of Mr. Hardingham.

Mr. Hand, on the 22nd of April, forwarded another notice, proposing Mr. Larter and Mr. Hardingham as the sureties, and wrote as follows:—

"I understood from my clerk that on the hearing of the application to dismiss your summons, neither you nor the registrar objected to my being security for Mr. Johnson; as you have now objected, it is not my intention to have any personal altercation on that point; I have, however, written to my client, and he now sends in the names of his proposed securities, of which I inclose you my formal notice, and have also sent copies to the registrar. The matter had now better proceed in the ordinary course. Both the proposed sureties will make the usual affidavit of justification. I see by the order the security was to have been given within seven days. Events have shewn this to be utterly impossible. I am not aware upon what authority the registrar puts us under terms for seven days, but in this it is not in me to dictate."

On the following day the defendant replied:—

"We cannot recognize your notice of sureties, dated on the 22nd inst., as in consequence of your not having obtained from the Court an extension of time within which to perfect security, an act of bankruptcy, as we are prepared to contend, was duly completed, and on the 21st our clients presented a petition for adjudication of bankruptcy, the hearing of which has been fixed for the 12th of May at the registrar's office at 12 o'clock, and a receiver has been duly appointed."

I may here add that it was not a valid objection to Mr. Hand as security, either on the part of the defendant or of the registrar, that he was the solicitor of the debtor. In the Courts of Common Law it has long been the settled practice not to take attorneys as bail for their clients, and there may be a professional feeling against doing so; but I apprehend the registrar could not, as stated in the defendant's letter of the 18th inst., decline to accept Mr. Hand as security, and the defendant was not justified in writing as he did on the subject.

On the 21st of April a petition for adjudication had been presented, with an affidavit, prepared by the defendant, that the plaintiff had committed an act of bankruptcy; and the act of bankruptcy sworn to was, that he did not, within seven days from the service of the debtor's summons, pay, or secure, or compound for the sum due.

On the same day an affidavit was prepared by the defendant, and sworn by Sir R. Harvey, that it was highly important in the interests of the creditors that a receiver should be appointed to take immediate possession of the property of the plaintiff. And on the same day, on the application of the defendant, an order for the appointment of a receiver was made.

On the night of the following day a person of the name of Bullard, the clerk of the registrar, having been appointed receiver, entered on the dwelling-house where the plaintiff was residing, and where he carried on his business, and he was deprived of the possession of all his property.

Adjournments of the hearing of the petition for adjudication took place on account of the absence of the county court judge, and on the 7th of May both parties were heard upon the last-mentioned petition, and the plaintiff was adjudicated a bankrupt.

The answer of the plaintiff to the petition, as far as I can collect it from the evidence, was that as there had been no appointment by the registrar, in pursuance of the 162nd rule, to complete the security, there had been no default by him, and could therefore be no act of bankruptcy.

It was urged on behalf of the petitioning creditor that the 82nd section of the Bankruptcy Act, 1869, applied, and that the objection taken was in the nature of a formal defect or irregularity, and that no substantial injustice had been caused; and the county court judge adopted this argument and decided accordingly.

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An appeal was presented to the Chief Judge in Bankruptcy, and heard on the 26th of May, and the chief judge dismissed the application with costs. (1) The reason given, according to the notes of the judgment handed up, was as follows:—

"An order was made on the application of the debtor that the summons be dismissed on his executing a bond with sureties within seven days. Therefore he must be taken to have known as soon as that order was pronounced that he had seven days, and only seven days, to do all that was required."

Unfortunately this was a mistake as to the terms of the order, which, in compliance with rule 41 and with the printed form, contains an indefinite stay of proceedings on the debtor's summons, and was also, as is submitted, founded on a mistake as to an act of bankruptcy having been at that time committed.

Accordingly an appeal was brought to the Lords Justices, and Lord Justice James, on the 2nd of August, 1870, without hesitation, allowed the appeal, on the ground that all proceedings on the debtor's summons were stayed when the petition for adjudication was presented, and annulled the adjudication, giving the petitioner all the costs, except those of the appeal to the Lords Justices. (2)

I wish to add here that, as the reason given for the annulling the adjudication (viz. that express stay of proceedings) was an obviously sufficient one, there is nothing to shew whether the learned Lord Justice thought the order to try the validity of the debt would not, in conjunction with the Act of Parliament, operate as a stay of proceedings, without any express stay; or that his Lordship thought an act of bankruptcy could be committed during the proceeding to try the validity of the summons.

The additional facts to be noticed are, that the debts of the plaintiff, besides his disputed debt, amounted to between 400*l.* and 500*l.*; that the live stock—bullocks, &c.—upon his farm, exclusive of horses, were sold for 800*l*; that the property under mortgage to Sir R. Harvey for 300*l.* had been mortgaged for 1990*l.*, and all had been paid off except 300*l.*; and that, according to the statement made by the plaintiff upon oath in the proceedings upon bankruptcy, besides the goodwill of his business as a draper, he was possessed of property of the value of 5000*l.*, after paying all his debts.

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(1) See ante, p. 330, n.

(2) Law Rep. 5 Ch. 741.

There appeared upon the proceedings to have been only one meeting of creditors under the bankruptcy, and this was held on the 31st of May, 1870.

It was said to be a meeting of the majority in value of the creditors, and, besides Sir R. Harvey's disputed debt of 453*l.*, there were other creditors of various sums, amounting altogether to about 170*l.* The defendant represented all the creditors there, having previously obtained their proxies; and the resolutions said to be come to were, that Mr. Bullard (who had been the receiver) should be the trustee, that Sir R. Harvey and two other persons should be the committee for superintending the administration of the property of the bankrupt, and that all moneys received by the trustees should be forthwith paid into Sir R. Harvey's bank.

The above is a general outline of the facts.

A question was raised in argument before us, whether, inasmuch as an adjudication actually took place upon the petition, and this adjudication was afterwards supported upon hearing both parties by the Chief Judge in Bankruptcy, this action could be maintained, although it turned out that the adjudication was entirely erroneous, and was afterwards annulled by Lord Justice James upon appeal. Now when we deal afterwards with the question of reasonable and probable cause, full effect will be given to the opinion of the county court judge and of the Chief Judge in Bankruptcy as arguments, and very strong arguments, in favour of the defendant; and if it appear that he acted bonâ fide, and had really only made a mistake, the fact that the judge made the same mistake would raise a strong presumption in his favour. But what I am now considering is a suggestion which was made in the course of the argument, that the matter having been brought regularly before the judge who heard both the parties, the adjudication was the act of the judge, and the person who instituted the proceedings could not be made responsible.

As regards the present case, there are several answers to this objection.

First: What is complained of is presenting the petition, which was at once followed by the appointment of a receiver, and which

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were ex parte proceedings, and, long before any adjudication, destroyed the plaintiff's credit, prevented his carrying on his business, and deprived him of the possession of all his property.

It can hardly be disputed, if the county court judge had refused to adjudge the plaintiff a bankrupt and dismissed the petition for adjudication, supposing the petition was presented and the receiver sent in without reasonable ground and maliciously, the plaintiff would be entitled to recover. And if this foundation of the proceedings be unlawful and actionable, how can it be said that because the county court judge afterwards erroneously acts upon them the plaintiff is not entitled to recover in respect of the consequences? The adjudication of the judge, which is set aside and annulled, cannot legalize what had been unlawfully done; nor can it prevent what followed from being the consequence of what had been unlawfully done. And as soon as the adjudication is annulled, all that takes place is properly the consequence of the petition, because the annulling the adjudication is not merely the reversal of a judgment, leaving the judgment operative in the meanwhile, but it annuls it as if it had never been made; and it is necessary to introduce express provision to protect the trustee and to give validity to his acts. This effect of annulling the adjudication follows not only from the word itself, but from sections 28 and 81.

It must be borne in mind that a petition for adjudication is not like an ordinary commencement of an action, which leaves both parties in the same position. It is a most important ex parte proceeding against a man, and must be on that account accompanied by a positive affidavit of an act of bankruptcy having been committed, since it may be followed by another ex parte proceeding for the appointment of a receiver. The necessity for the affidavit and the form of it appear by the bankruptcy rules and forms. The petition may be likened to an application for a capias to hold to bail, and the latter application requires in like manner a positive and distinct affidavit of the debt. The one makes a man's property liable to be taken, the other makes his person liable to be taken; the distinction being, that the one requires the intervention of another ex parte proceeding, viz., the application for a receiver, the other does not.

Secondly: The statement contained in the affidavit accompanying the petition for adjudication was untrue. It was either untrue in stating that an act of bankruptcy had been committed, or (if an act of bankruptcy in one sense had been committed) it was untrue in putting forward an act of bankruptcy as one which could then be made the subject of proceedings when it could not be so made. The petition itself assumes that there is no stay of proceedings, and the affidavit which accompanies it, and on which it is founded, of necessity contains the same assumption, so that the omission of the pending application to dismiss the summons, and of the stay of proceedings, is not only a suppressio veri, but also a suggestio falsi.

But if the affidavit can be read as stating the facts truly, and the mistake was in the judge in acting upon it after the facts were brought before him, I should still be of opinion that, supposing it to be established that the proceeding was in reality an unfounded and improper one, and that there was malice and an absence of reasonable and probable cause, the defendant could not defend himself upon the ground that the injury was caused by the mistake of a judge. Every one suffers more or less from the mistakes and errors of others. A man may mistake another for an assassin and deal with him accordingly. Or a man may by a mistake be convicted of a crime of which he is innocent. Such results are inevitable. Humanum est errare. It is an influence which sometimes may operate (for a time at least) in a man's favour, but more generally to his prejudice. Is it not then a wrong deserving of redress if a man without any reasonable ground, and from a bad motive, brings another within the sphere and reach of this adverse influence, and to his great damage? It may be that the whole proceeding is knowingly taken in the expectation of a mistake being made and to take the chance of it. The mistake of the judge may be the only hope of a vindictive prosecutor, and still he may state nothing but the truth.

Suppose, for example, a man to take proceedings against another at petty sessions for some offence against the game laws. The prosecutor makes out a good primâ facie case by true evidence. The defendant being taken by surprise, or not having his witnesses ready, is convicted. He appeals to the quarter sessions, and the case is fully gone into, and it is established in the clearest manner

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that the man is innocent, and that there was no real ground whatever for the charge, and that the prosecutor must have known it, and the conviction is quashed. In like manner the question before the petty sessions might have turned upon the applicability of some Act of Parliament to the matter brought forward, and the justices, from some cause anticipated and expected by the prosecutor, such for instance as the influence of advocacy, or imperfect argument of the question, or from the subject not being perfectly understood, or from strong opinions which the magistrates were known to entertain, came to a conclusion unfavourable to the accused, which was afterwards shewn to be clearly erroneous, and was accordingly set aside. Supposing in these cases it to be made out that there was no reasonable or probable cause for taking the proceedings, and the prosecutor in taking them was influenced by a bad motive, would not the person accused and injured have a claim to redress, and would it be said that the whole was the mistake of the judge, and that the administration of the law and not the prosecutor was to blame? The difficulty of proving the absence of reasonable and probable cause might be increased in such a case, but that is all. The prosecutor would be to blame, and would be responsible because he instituted the proceedings against the accused, and did so without reasonable ground and from a bad motive.

A case was referred to on the argument: *Farley* v. *Danks* (1). That was an action like the present, for wrongfully and without reasonable cause and maliciously suing out a commission in bankruptcy, and causing the plaintiff to be adjudicated a bankrupt. In that case the defendant had made an affidavit which contained untrue statements, but which if true did not amount to an act of bankruptcy. The plaintiff was nevertheless adjudicated a bankrupt upon that affidavit. The bankruptcy being afterwards superseded, the action was brought, and it was strongly contended for the defendant that the insufficient affidavit of the defendant had not caused the adjudication, but the blunder of the commissioner. The Court, however, unanimously rejected the objection. This case is a conclusive authority that the erroneous adjudication of the judge may properly be said to be caused by the defendant if

(1) 4 E. & B. 493; 24 L. J. (Q.B.) 244. 1 Jur NS 331

he has improperly set the law in motion. Lord Campbell, in his judgment, says: "The declaration was clearly proved. It alleges that the defendant caused and procured the plaintiff to be adjudicated a bankrupt. Is that true? The defendant presented a petition in which he alleged that the plaintiff had committed an act of bankruptcy. He swears to the existence of a debt, and that no payment has been made. And thereupon the adjudication takes place, which would not have taken place but for the defendant's presenting the petition and making the deposition."

Mr. Justice Coleridge says, "It seems to me that we are to interpret the words 'caused and procured' in their ordinary sense. An interpretation, as it seems to me, rather refined, and for which I see no authority, is suggested, that nothing is a consequence of the untrue statement which would not be a necessary and legal result of the truth. The words are satisfied, if the false statement in fact occasions the result." Mr. Justice Crompton says, "The only principle on which we could make the rule absolute would be that a legal consequence of the defendant's statement must be proved. But there is not the less wrong in causing the act to be done, because the act would be illegal at any rate. In a popular sense, a person who puts the law in motion causes the thing to be done." So that the adjudication is the consequence of the petition.

In *Cotton* v. *James* (1) there had been an adjudication, and the form of the declaration appears, both from the statement of facts and the judgment, to have been for suing out the commission only; and all that followed must have been regarded as a part of the damages, and not as a substantive cause of action. And in substance it is so in the present and in every similar case, and there are not separate causes of action upon the several alleged steps in the proceeding. And this seems of itself to dispose of the suggested objection to the plaintiff's recovering, founded upon there having afterwards been an adjudication upon hearing both parties.

In the course of his judgment in the case of *Farley* v. *Danks* (2) Lord Campbell says: "Where a man makes a true statement of

(1) 1 B. & Ad. 128.

(2) 4 E. & B. at p. 499; 24 L. J. (Q.B.) 244. Jur N S. 372

fact, upon which the Court acts wrongly, the grievance, it is true, arises not from the statement, but from the judgment; but it would be monstrous to hold that this is so where the statement is maliciously false."

A man is not responsible for an act of the judge which is, upon the face of the proceedings, an illegal one, if he has only stated the truth. For example, if a man were to make a complaint before a magistrate for an assault, and the magistrate were to issue a warrant for an assault and highway robbery, the complainant would not be responsible, though he had set the law in motion without sufficient grounds. In such a case the illegal act of the magistrate would not be attributed to the complainant. And, of course, where a man only gives true information to a magistrate or other person, and the magistrate or secretary of state directs a prosecution, there the man merely giving the information is not responsible at all. But, in general, prosecutions in this country are at the instance of, and conducted, by private prosecutors. In such cases the committal of the accused for trial is a judicial act done upon hearing both parties; but I never heard it suggested that the prosecutor, who had applied for the warrant, and who had the man brought up, was not liable for all the consequences if it appeared afterwards that the prosecution was wholly unfounded, merely because the prosecutor had not stated what was positively untrue in his depositions.

I apprehend that, if three things concur, the person prosecuting the proceedings is liable to an action. First, if the proceeding be really without foundation; and this must be evidenced by the proceedings having finally terminated in favour of the plaintiff, whether the proceedings be in bankruptcy or by indictment (see *Whitworth* v. *Hall* (1), where it is said that actions for malicious prosecutions, malicious arrests, and taking bankruptcy proceedings, stand upon the same foundation). Secondly, the proceeding must have been taken without reasonable and probable cause. And thirdly, lest persons should be deterred, by fear of the consequences, from enforcing the law with despatch upon bonâ fide suspicion, before a man can be made responsible it must be shewn that, in taking the proceeding, he was actuated by malice or by some bad motive.

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(1) 2 B. & Ad. 695, at p. 698.

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It remains, therefore, to see whether in the present case there was sufficient evidence upon these three matters.

As regards the first—viz., the proceeding being unfounded (or, as it is called in the declaration, false)—the judgment of Lord Justice James, annulling the bankruptcy, is conclusive.

As regards the second ingredient—viz., the absence of reasonable and probable cause—it is upon this part of the case that the chief difficulty (at least, in my mind) has existed, because this is a matter of law, and there may be sufficient undisputed facts to enable the judge to determine this question in the defendant's favour; and if that be so the motive of the defendant is quite immaterial.

The question is, whether there was reasonable and probable cause, or, more correctly speaking, a want of reasonable and probable cause, for presenting the petition for adjudication on the 21st of April as upon an act of bankruptcy then committed.

In order to determine this, it is necessary to consider the provisions of the Bankruptcy Act, 1869, relating to proceedings under a debtor's summons. I think that it will be found that this Act has made a considerable change in the law, and that a person served with a debtor's summons who disputes the debt is now under the protection of the Court, instead of being, as he was before, to some extent, at the mercy of the creditor.

It should be noticed that the Act, and the bankruptcy rules made in pursuance of the Act, must be construed together. By s. 78 the rules have the same power as if enacted in the body of the Act.

In the argument before us, and also before Lord Justice James, this was not sufficiently attended to, and undue reliance was placed upon the language of s. 7, without regard to the rules of Court and prescribed forms which carry the enactment into effect.

The act of bankruptcy is described in the 6th sub-sect. of s. 6, and is in the following terms:—

"That the creditor presenting the petition has served, in the prescribed manner, on the debtor a debtor's summons, requiring the debtor to pay a sum due of an amount not less than 50*l.*, and the debtor, being a trader, has for the space of seven days . . .

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succeeding the service of such summons neglected to pay such sum, or to secure or compound for the same."

It should be observed, that this act of bankruptcy is only found in the Acts of Parliament subsequent to 6 Geo. 4, c. 16, and is of a very stringent nature, for it may arise out of non-payment of a sum of money which the debtor may bonâ fide deny that he owes, but still may be unable to pay or secure. This power to compel a man to commit an act of bankruptcy is obviously liable to abuse, and may be made the means of great oppression; and as a person who uses a dangerous instrument is bound to the greater care, so a person using this power should be upon his guard, especially if he use it in an oppressive manner, not to overstep the law. The case of *Oldfield* v. *Dodd* (1) shews how strictly such an enactment is construed. In the course of the argument in that case Mr. Justice Cresswell speaks of its effect being to make a man a bankrupt by an entirely new course of proceeding; and Mr. Justice Maule characterizes it as an "extraordinary and summary mode of making a man a bankrupt." The present Act, however, gives the debtor some better protection than he had before.

The 7th section first enacts that the summons shall be in the prescribed form, giving to the debtor, both in the body and in the indorsement, a proper warning of the effect of it; and in the second part of the section it points out how the debtor, if he denies the debt, may apply to dismiss the summons, and may have all the proceedings on the summons stayed until the validity of the debt is determined. The language of this section, taken by itself, might give some ground for the inference that the giving the required security is a condition to the stay of the proceedings; but the rules of Court deal clearly with this proceeding, and make the stay of proceedings unconditional. At the same time, these give full effect to this section, since, if the security is not given, the stay of proceedings might be removed.

It is necessary to advert to the prescribed form of the debtor's summons. It is form 4 of the schedule to the rules, and in the body of it the debtor is informed that, unless he pays, or compounds for the debt within seven days, he will have committed an act of bankruptcy, on which he may be adjudged a bankrupt on the petition of the creditor, unless he shall have applied within the time to dismiss the summons on the ground that he denies the debt; and the indorsement on the summons gives him notice that the application to dismiss the summons must be accompanied with an affidavit denying the debt, when the registrar will fix a day for hearing his application.

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(1) 8 Ex. 578, at p. 582; 22 L. J. (Ex.) 144. 7 Jur 261.

This indorsement is in compliance with the express direction of rule 22, and rule 23 provides that, upon the debtor filing the affidavit, the registrar shall fix the day for hearing the matter and give notice to the creditor.

The effect of the writ and indorsement appears to me to be quite clear, that if the application is made with the proper affidavit, no act of bankruptcy is committed till the application is disposed of. For the 7th section of the Act provides that the summons and the indorsement shall be in such a form as to make known to the debtor the consequences of inattention to the requisitions therein made, and he is informed that he will have committed an act of bankruptcy unless he applies within the seven days for a dismissal of the summons. So that he would be deceived by the contents if there was still an act of bankruptcy, notwithstanding he had applied with a proper affidavit and obtained an appointment from the registrar to hear his application.

It was suggested, I think, upon the argument, that the summons might be read as notifying that at the expiration of the seven days there would be a complete act of bankruptcy and then, as a separate clause, that unless an application to dismiss were made within the seven days, there might be an adjudication. But the effect of this would be that if the summons was dismissed, and no debt ever existed, there would still be an act of bankruptcy at the expiration of the seven days, though the defendant had denied the debt upon oath within that time: and a man might be compelled to commit an act of bankruptcy as often as a creditor swore that he owed him a debt above £50, though there was in each case no debt at all. It appears to me that the rational and also the grammatical construction of the summons is, that if the defendant is not paid, &c., within seven days, then unless a proper application is made within that time to dismiss the summons, there will be an act of bankruptcy, and the defendant will be liable to be made a

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bankrupt. And this agrees with rule 41, which provides that there shall be no adjudication upon a petition founded on such an act of bankruptcy between the application to dismiss the summons and the hearing of the application, which is substantially the same as enacting that there shall be no act of bankruptcy to found an adjudication.

But the matter is made more clear when the prescribed form of the order is considered which is given if the debt is really disputed. It is No. 9 in the Appendix, and directs that the debtor shall give security by bond, with sureties to be approved by the registrar to pay any sum which the creditor may recover against the debtor in any proceedings taken to recover the sums mentioned in the summons and costs. And there is a separate paragraph at the end—"And it is further ordered that all proceedings on this summons shall be stayed until the Court in which the proceedings shall be taken shall have come to a decision thereon."

It thus appears, that under the present Act of Parliament, as soon as the debtor has made the application and filed the required affidavit, both parties are upon an equality, except that the registrar may, if he thinks proper, require security for the debt. There is nothing conditional in the order, and no number of days is fixed for the giving the security; and the debtor is relieved from the difficulty which he was in before of being embarrassed and obstructed in completing his security within seven days, and then having an adjudication snapped against him if he had a sharp practitioner to deal with. Under the present Act no step can be taken without applying to the Court. There is no presumption against the debtor, and provisions are introduced for his protection as a litigant party before the Court. For example, it is provided by rule 25, that unless the creditor shall take proceedings within twenty-one days after security is given to establish the debt, and shall prosecute them with effect and without delay, the debtor shall be entitled to have the summons dismissed with costs. This places the debtor in the same position as a defendant in an ordinary suit, when he obtains judgment as in a case of a nonsuit.

The intended effect of the order made upon a denial of the debt, when that debt is made the foundation of an act of bankruptcy, becomes clear when that order is compared with the order made upon a denial of the petitioning creditor's debt only. In that case, the bankruptcy not being the subject of dispute, it is necessary to proceed with vigour and with despatch to prevent the dilapidation of the bankrupt's estate, and accordingly we find that the order No. 18 in such a case is essentially different from No. 9 to which we have referred. By No. 18 the bond is to be given within a stated number of days, and the stay of proceedings is only conditional upon the bond being given. So that in the latter case the power is left in the hands of the creditor, which is taken from him in the former.

It certainly appears to me to be the clear result of s. 7 of the Act, and of the rules 22, 23 and 41, and of the order No. 9, that as soon as the debt being denied that order is made, the existence of the debt, and the validity of the debtor's summons is placed sub judice in the court where the proceeding is taken, and, that being so, the effect and operation of the debtor's summons is necessarily suspended as long as that state of things continues. And as the act of bankruptcy is not the mere non-payment of the debt, but the non-payment in obedience to the summons, and the summons is the foundation of the act of bankruptcy, as long as the validity of the summons is sub judice, there can be no act of bankruptcy by disobedience to it. As soon as the validity of the summons is determined, then either it is dismissed, in which case there is of course no act of bankruptcy, or the application to dismiss it is rejected, and then the result is the same as if there had been no application to dismiss it at all and an act of bankruptcy had been committed; and, if the date of it became of consequence, it would probably be at the expiration of the seven days mentioned in the summons.

If the conclusion arrived at is correct, then not only was the petition for adjudication improperly presented while the validity of the whole proceeding was sub judice, and all proceedings consequently stayed, but the adjudication was obtained by the defendant upon an affidavit which was untrue, in stating that an act of bankruptcy had been then committed, in particularizing as an act of bankruptcy to found an adjudication the non-payment of the debt, which was only an act of bankruptcy under a different state of facts from that which then existed, and in suppressing the unconditional stay of proceedings. It is true this last fact must be taken to be known to the registrar, but the event shewed that it made no difference whether he knew it or not; and in fact the omission from the affidavit of all notice of the application and stay of proceedings made it good upon the face of it, and a sufficient foundation for all the subsequent proceedings.

One argument must be noticed which was addressed to us on behalf of the defendant, namely, that although no adjudication could be made during the stay of proceedings, yet there was nothing to prevent a petition for adjudication from being properly presented. And for this purpose we were referred to the language of rule 41. That rule declares that the debtor, in such cases as we are now considering, shall not be adjudicated a bankrupt on the petition of the creditor until after the hearing of the application to dismiss the summons, or when the summons has been dismissed, or during a stay of proceedings. And the argument was that it may be implied from this that, although there can be no adjudication, yet the petition may be presented.

It is a sufficient answer to this to say that if the petition for immediate adjudication is well founded, the adjudication must follow; and if a man cannot be adjudicated a bankrupt upon an existing state of facts, no petition can be properly presented upon those facts. But it seems to me to have been unnecessary to provide, as is done at the end of the rule, that there shall be no adjudication if the summons is dismissed, or during a stay of proceedings. It was necessary to provide for the interval between the application to dismiss and the hearing of the application, because the application itself was not made a stay of proceedings, and, having done so, the other matters were added (though unnecessarily) lest they should seem to be excluded. But, further, the order itself contains a stay of all proceedings on the summons. How can it possibly be said that a petition which is an ex parte proceeding, to be followed by the appointment of a receiver, which is also an ex parte proceeding, and which destroys a man's credit, and deprives him of the possession of all his property, is not within the stay of all proceedings? It is in fact *the* proceeding to be taken upon the summons, for s. 7 directs that the summons shall state that in the event of the debtor not paying, &c., a petition may be presented against him praying that he may be adjudicated a bankrupt.

It follows from what has been said that the presenting the petition, the procuring the appointment of a receiver, and the procuring of the adjudication, were acts done in clear violation of the Act of Parliament. As the defendant was taking the proceedings under this Act, and putting it into force against the plaintiff, he must be taken to have been acquainted with its contents, and he did himself, moreover, draw up and serve the order of the 12th of April containing the stay of proceedings in pursuance of the Act. It appears, therefore, to me that the defendant acted without reasonable and probable cause when he took such important steps at a time when they were forbidden by the Act under which he was proceeding. But I think this conclusion must be taken, subject to the qualification, that, in a matter of some difficulty connected with a new Act of Parliament, and on which opinions might differ, a mistake might be made without any blame attaching, and that a person under the influence of such a mistake might still have reasonable and probable cause for taking a proceeding, which it turned out afterwards was not justified.

But this, I think, introduces the province of the jury to determine whether the defendant in what he did was acting under a bonâ fide mistake as to the effect of the Act. If I had been compelled to form my own opinion upon that question at the trial, I should have thought that the defendant was not acting under the influence of a mistake at all, but under the influence of a determination to drive the plaintiff into bankruptcy, and that, under that influence, he hastily and gladly, and perhaps blindly, laid hold of the opportunity which the expiration of the seven days mentioned in the order gave him of arriving at his object. But in considering the question of reasonable and probable cause, it is quite right to take the opinion of the jury whether, at the time when the proceeding was taken, the defendant really believed it was a well-founded proceeding. This was settled by the case of *Heslop* v. *Chapman* (1). It was an action for a malicious prosecution for perjury, and information had been given to the defendant which, if true, justified him in instituting the prosecution. The learned judge

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(1) 23 L. J. (Q.B.) 49. 18 Jur 348

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who tried the cause directed the jury (1) that if the defendant "at the time when he preferred and prosecuted the indictment, acting upon the information which he had received, believed, and had any reasonable grounds to believe, that the plaintiff had sworn falsely . . . . then there was reasonable and probable cause for preferring and prosecuting the indictment; but if the defendant at the time when he preferred and prosecuted the indictment did not believe the information he had received to be true, but in his own mind believed, and had reasonable grounds to believe that the plaintiff had not sworn falsely, and still more, if he believed that the plaintiff had spoken the truth, then there was no reasonable and probable cause." A bill of exceptions was tendered by the defendant to this direction, and, after argument, it was unanimously upheld in the Exchequer Chamber.

The rule had been clearly laid down before in the written judgment of the Queen's Bench, in *Turner* v. *Ambler* (2): "In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding; and perhaps whether it did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred. In the present case the plaintiff had certainly dealt with the defendant's goods in such a manner as could hardly fail to raise a strong suspicion that he had committed a felony. On this the judge gave his opinion that there was reasonable and probable cause for the prosecution. His knowledge of this could not be made a matter of doubt. But the plaintiff imputed to him on the trial that he took unfair advantage of the irregular conduct of the plaintiff to turn him out of possession of his house, without believing that a felony had been committed; and he pointed to the defendant's eagerness to get rid of him as a tenant as furnishing evidence, not of his motive, but of his opinion. It is difficult to distinguish between this state of mind and malice; but the Court of Common Pleas, in a late decision, sustained a direction that the defendant, though cognizant of

(1) 23 L. J. (Q.B.) at p. 50. 18 Jur 348

(2) 10 Q. B. 252, at p. 260; 16 L. J. (Q.B.) 158, at p. 160.

reasonable and probable cause, did not think it reasonable and probable, but acted from malicious motives only, and without that belief." And to the same effect is the case of *Ravenga* v. *Mackintosh* (1), an action for a malicious arrest, in which a most accurate judge, Mr. Justice Holroyd, says (2): "Assuming that a bonâ fide belief, founded upon the opinion of counsel, that a party had a good cause of action, when in fact he had none, would be sufficient to shew that he had a probable cause of action (upon which, however, I pronounce no opinion); still in this case, as it must be taken after the finding of the jury that he did not believe he had any cause of action, it is quite clear that there was no probable cause." And it is obvious that if this were not so, a man might intentionally make the abstract possibility of mistake when there was really no mistake, an opportunity for gratifying malicious feelings by an injurious proceeding.

This matter has been fully considered, and the authorities referred to, because it forms a very important ingredient in the present case. It is of itself a complete answer to what appears at first sight a serious objection to the plaintiff's case, viz., that if the county court judge and the chief judge thought there was good cause, the defendant was entitled to think so too. Another answer to that objection is, that those judges were imposed upon by the positive affidavit prepared by the defendant, which he ought to have known to be untrue, and which by the finding of the jury he did know to be untrue. For the opinion of the jury was taken whether the defendant knew and believed at the time of filing the petition, that further proceedings in bankruptcy were stopped until the registrar made the appointment for the examination of the sureties and the execution of the bond; and the jury found that he did so know and believe; and it was in reality until that appointment that the proceedings were stopped. For if at that time the plaintiff had not been ready with sufficient sureties to execute the bond, he would have lost the benefit of the order of the 12th of April, and the registrar might have set it aside and dismissed the plaintiff's application, and so the proceedings in bankruptcy would then have gone on.

It only remains to be considered upon this part of the case

(1) 2 B. & C. 693.

(2) 2 B. & C. at p. 698.

whether there was sufficient evidence to be left to the jury of this knowledge and belief of the defendant; for this is not to be assumed, though there be an improper motive, without some evidence. (*Turner* v. *Ambler* (1) above cited.)

Such knowledge and belief cannot, of course, be distinctly proved, and must be collected from all the circumstances; but there was ample evidence of it for the jury. In the first place, the defendant may be taken to have made himself thoroughly acquainted with the provisions of an Act of Parliament under which he was taking these proceedings. Secondly (which is of itself sufficient), he had himself drawn up the order of the 12th of April, requiring the security to be approved of by the registrar, and ordering a stay of proceedings. Thirdly, it was open to the jury to consider that the stay of proceedings was corrected afterwards, because he found it would shew that he had no cause for proceeding. There are other circumstances in the correspondence on the subject of the security, in the consulting Sir R. Harvey on the 21st, and not taking proper advice in a doubtful case, and in insisting upon a written admission from the plaintiff of the legality of the proceedings as a condition for sparing the plaintiff's property, which are material upon this part of the case, as well as upon the question of malice.

There was, no doubt, evidence the other way in the fact that he would hardly with this knowledge and belief take proceedings which were so likely eventually to be abortive. The jury may well have thought it a sufficient answer to that improbability that if a sufficient affidavit could be made to found a petition for an adjudication, and get a receiver at once appointed, the plaintiff would probably be crushed, and at the mercy of the defendant's client. And the groundless haste with which the receiver was appointed and put into possession (as will be afterwards pointed out) favours that conclusion. In fact, after the proceedings before the chief judge, the plaintiff was overwhelmed, and did sue for mercy, but the defendant or his partner insisted upon his signing a paper admitting that all the proceedings were legal and valid, and *that* he refused to do. It was also some evidence, no doubt, against the defendant's knowledge of the defect in the proceedings, that all the facts were known to the registrar, and he would probably at once set the matter right. But the result shewed that no apprehension need be entertained of the knowledge or judgment of the registrar, for he at once, and though with full notice of the facts, as is suggested, adopted the petition, sent the receiver into immediate possession, and assisted at and drew up the adjudication. There was, therefore, sufficient evidence to justify the conclusion of the jury upon this part of the case, and I cannot say that I am dissatisfied with their conclusion.

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(1) 10 Q. B. 252, at p. 260; 16 L. J. (Q.B.) 158, at p. 160.

The only remaining question is, whether there was any evidence which could properly be left to the jury of malice, or of the defendant acting under the influence of some improper motive. I apprehend that the mere fact of the defendant taking the proceedings with the knowledge and belief that they could not properly be taken, would be some evidence of malice. But in the present case the conduct of the defendant throughout the whole of the proceedings from the beginning to the end was before the jury; and I do not say it deserved an unfavourable construction, but it certainly admitted of such a construction, and might be attributed to the influence of those motives of interest which are for the most part hidden beneath other appearances, and must be left to the careful conclusion of men of the world with good sense and good feeling rather than be made the subject of strict argument and reasoning.

The whole proceeding to make the plaintiff a bankrupt was, no doubt, a lawful one; but the object of the proceeding was not a proper one. There is no pretence for saying that the proceedings were taken to carry into effect the legitimate objects of the bankruptcy law, viz., the fair distribution of a bankrupt debtor's assets among his creditors, so that his debts may be paid. The proceeding was taken by an angry man to coerce the plaintiff into an admission of the debt. It appeared distinctly in the evidence that the defendant was told that if the plaintiff admitted the debt the proceedings in bankruptcy need not be taken.

A proceeding originated in anger, and for the above purpose, was not likely to be conducted with consideration or fairness, and there are many unfavourable circumstances in the conduct of the defendant throughout. He begins at the meeting before the registrar on the 12th of April, by throwing out a charge of the bills being forgeries, and somehow prevails upon the registrar to compel security to be given (which, having regard to the position of the plaintiff and to the offer of security which was made, and the mortgage which Sir R. Harvey held), was quite unnecessary.

He is then, somehow or other, a party to the period of seven days for giving the security being inserted in the order. I don't stop to examine the evidence for the defendant, as to this originating with the registrar. I think it appeared, however, that this was the first case of the sort which the registrar had ever had. The defendant, however, draws up the order in that form at variance with the forms in use. And it is unfortunate for him that it was the insertion of this period of seven days which he afterwards made the ground of petition for adjudication.

I pronounce no decided opinion upon the effect of the correspondence between the defendant and Mr. Hand on the subject of the sureties, but (bearing in mind that it had been stated on the 12th of April, that there would be no difficulty in extending the period of seven days), a person reading it with some care would be able to form an opinion whether there was an appearance of reservation and design on either side, and the conclusion upon that alone, taken by itself, would be unimportant; its importance would arise from its throwing light upon the conduct pursued on the 21st.

On that day, somehow or other, in consequence of the terms of the order of the 12th of April, and what had taken place in the meantime, the plaintiff had been brought into some difficulty. This was obviously attributable not to the plaintiff himself but to Mr. Hand, whose conduct and default, if there was any, appears upon the correspondence, and who might have been liable to an action at the suit of the plaintiff, if the adjudication had been upheld.

Now, under what circumstances did the defendant take the decisive proceedings of the 21st of April? It appears that it was thought necessary to see Sir Robert Harvey on the subject. This was certainly no act of bankruptcy upon which the plaintiff could act as a matter of course, under his general directions to take proceedings in bankruptcy against the plaintiff. Mr. Emerson gave some account of what took place when he saw Sir R. Harvey. The jury were entitled to come to their own conclusion as to the real effect of what took place. We cannot say positively that Sir

Robert was told that the seven days had expired, and from the delay interposed in giving the security the plaintiff was in a difficulty, and might be taken at a disadvantage. But we know from Mr. Emerson's statement, that it ended in Sir Robert Harvey saying, that if Mr. —— had had the matter, the fellow would have been made a bankrupt long ago. "The fellow would have been made a bankrupt!" What does this mean? There was no real object to administer the estate in bankruptcy for the benefit of the creditors. It means "the fellow who has dared to dispute my debt would have been punished." And what is done? On that day the "fellow" is made a bankrupt. The defendant on the same day prepares the petition, prepares the affidavit of Sir R. Harvey and gets it sworn, prepares the affidavit for a receiver and gets it sworn. Were these affidavits true? I think they were both false.

Truth and falsehood, it has been well said, are not always opposed to each other like black and white, but oftentimes and by design are made to resemble each other so as to be hardly distinguishable; just as the counterfeit thing is counterfeit because it resembles the genuine thing. The affidavit supporting the petition has the resemblance of truth, but is, I think, not really true. It amounts to this. The plaintiff did not pay a sum within seven days from the service of the summons, and so has committed an act of bankruptcy. I have stated my opinion that the non-payment within the time is only an act of bankruptcy when an application to dismiss the summons is not pending.

It was essential to the affidavit accompanying the petition (the petition being the groundwork for the appointment of a receiver), that there should be a positive statement of an act of bankruptcy, as appears by the rules and forms, and therefore the affidavit is in this form. It is untrue, as I have said, in stating that an act of bankruptcy had been committed. But it is equally untrue, if the act of bankruptcy was one which was not available because proceedings were pending to try the validity of the summons, to conceal that fact, and so make an affidavit which justified upon the face of it the appointment of a receiver. It is really difficult to suppose that, after what had taken place, the defendant could believe that the plaintiff was precluded from disputing the debt, and hence the conclusion of the jury in answer to the third question involves this, viz., that the affidavit was untrue, and knowingly so, in what was concealed. But what can be said of the affidavit for a receiver as a part of the proceeding for making the fellow a bankrupt? What necessity for a receiver before adjudication, when the real object of the proceedings is known?

The affidavit states it was highly important for the interests of the creditors that a receiver should be immediately appointed. Was there any real ground for this?

With the mortgage held by Sir Robert, which had been reduced from 1990*l.* to 300*l.*, and the readiness with which the other bank balance had been paid off, and the offer to secure the debt which was the real cause and ground of these proceedings, and the position of the plaintiff carrying on his business in the ordinary way, was it not known, or ought it not to have been known, to be untrue?

I am aware that Mr. Emerson, in his evidence on the trial, states that Sir Robert had said that the plaintiff might make away with his property. This was a matter of some importance to state at the trial; but the jury would have to consider whether, if Sir Robert said so, he believed it, and whether the defendant, who knew what the real cause of the proceedings was, could have thought Sir Robert believed it under the circumstances, and when he was in possession of such a security.

Further, after the chief judge had on the 26th of May affirmed the adjudication, the plaintiff seemed to be at the mercy of the creditor, and asked Mr. Emerson to intercede with Sir Robert for him. He, in effect, begged that everything might not be sold, and told him he was ready to give an ample mortgage upon his property and pay the disputed debt, and everything, rather than be ruined. They insist, as a condition, that he shall sign a paper admitting all the proceedings to be legal. This was on the 28th of May. At that time the amount of the plaintiff's liabilities was known, and the receiver had been in possession, and the ample extent of his property must have been known. It can hardly be doubted that all this was communicated by Mr. Emerson to his partner, the defendant, before the meeting of creditors. On the 31st of May there is a meeting of the creditors under the bankruptcy. The only person present (as I read the proceedings), is the defendant, who has the proxy of all the creditors, from Sir Robert for 453*l.* down to Mr. ——, for 14*s.* 6*d.*, and it does place the defendant in a very unfavourable light that he should, under circumstances which I have mentioned, have proposed and carried a resolution that the disposal of the whole of the plaintiff's property should at once be placed in the hands of Sir Robert (the principal person in the committee of inspection), and the proceeds paid into his bank; in other words, that he should be placed entirely in the power of such a creditor.

Those are the circumstances attending the step taken by the defendant to make the plaintiff a bankrupt on the 31st of May. I cannot see how there can be two opinions as to the plaintiff having sustained a most grievous injury. On the morning of the 22nd of May he was a prosperous man carrying on his business in good credit, occupying two well-stocked farms, and he had been so thriving as to reduce the mortgage upon his freehold property from 1990*l.* to 300*l.* I cannot see that he had done anything wrong or approaching to what was wrong. He had disputed a claim made by his banker, but had offered ample security for it if established, and had a right to suppose that it was in a course for decision, and could not have any idea of the destruction which was impending over him. And on the night of that day, without anything like notice or preparation, his house is invaded, his trade put a stop to, his credit destroyed, and he is deprived of the possession of all his property. And this occurred after he had proposed, as I think I noticed, to give a charge upon his property for the debt if it was established. Is there to be no redress *for this* against the man who did it? That really depends upon whether the proceeding on the 21st of April was taken by the defendant without reasonable and probable cause. I feel this to be a question of some difficulty, particularly as I understand there is some difference of opinion among my learned Brothers on the subject. I have before considered how far the question of reasonable and probable cause depends upon the animus and state of mind of the defendant. But, as I think the decision of the present case turns upon a correct view being taken of reasonable and probable cause, I will make an additional remark on it. I will suppose the defendant, feeling some doubt as to the legality of the petition for adjudication and the propriety of making an affidavit of an act of bankruptcy having been committed, had taken proper advice upon the subject, and received for answer that it was a matter of considerable doubt, and too doubtful to justify such a step being taken. Would he have had reasonable cause because the answer was a doubtful one? I think not. I think a state of doubt in his own mind would not be enough, though in a really doubtful case an honest belief might: *Ravenga* v. *Mackintosh* (1). The refusal to entertain the concession asked on the 28th of May, which secured Sir Robert everything he could require, unless the plaintiff admitted the legality of all the proceedings, indicates a doubt then existing, even after the decisions which had taken place; and I must say, apart from the finding of the jury on the second and third questions, all the circumstances of the case, from the beginning to the end, tend to shew that the acts of the 21st of April, which placed the plaintiff in the position of a bankrupt, were taken in headstrong and reckless obedience to the angry wishes of Sir Robert Harvey. The defendant may have rushed to the conclusion that the plaintiff was in such a difficulty that the law could not enable him to get out of it; but this is very different from a bonâ fide belief that the law justified the proceeding.

I am, therefore, of opinion, that the defendant is not entitled to enter a verdict upon the questions reserved; that there was no misdirection; that the verdict is warranted by the evidence, and therefore that the rule should be discharged.

BRAMWELL, B. The plaintiff complains that the defendants maliciously and without reasonable and probable cause presented a petition, praying that the plaintiff might be adjudicated a bankrupt, and caused and procured him to be so adjudicated. This is the form and substance of his complaint. A verdict has been found for the defendant Emerson, and the question now is whether the plaintiff has shewn an absence of reasonable and probable cause as to the remaining defendant, Sparrow. I am of opinion he has not; on the contrary, in my judgment the defendant not merely had reasonable and probable cause for all he did, but all he did had real and proper cause, and was according to law. Let me say at the outset that I think the plaintiff ought not to have been adjudicated a bankrupt. I agree with Lord Justice James (1) that by the order of the 12th of April proceedings were stayed. I further think they were stayed by virtue of rule 41. I should also think they were stayed by implication without express words directing a stay; upon the principle that where a matter is pending on the determination of which the next step depends, that next step cannot be taken, as for example a summons to set aside proceedings for irregularity is a stay from its return. In my opinion the plaintiff's application to dismiss the debtor's summons of Sir R. Harvey was pending. He, the plaintiff, had done all he could do; the registrar had failed to give notice under rule 162, and the seven days in the order of the 12th of April were not a time within which the plaintiff was to perfect the security at his peril. I mention these several grounds for thinking the proceedings stayed from a motive which will appear. It is enough that they were stayed for any reason, and nobody now disputes they were. If so, then the plaintiff ought not to have been adjudicated a bankrupt. By that adjudication a wrong and injustice were done him. I do not say this disrespectfully. The judge made a mistake, as we see now it is pointed out. It is to be hoped this may be forgiven in a judge, but it was this mistake that caused the wrong to the plaintiff: the defendant did nothing wrong.

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(1) 2 B. & C. 693.

This I will now proceed to establish. As attorney for Sir R. Harvey, he issued the debtor's summons. No one can doubt Harvey's right to do that. The debt was due. It may be the plaintiff bonâ fide disputed it. But whether he did or not (as to which I shall have to say a word presently), the statute gives the creditor a right to issue such a summons. It may be issued against the most solvent and honest man in the country, who with perfect good faith disputes a debt. The next step the defendant took as attorney for Harvey was to present the petition for adjudication, in which he stated that the plaintiff had committed an act of bankruptcy, by neglecting to pay, or secure, or compound for the debt within seven days after service of the debtor's summons. In my judgment, that statement was true; he had committed an act of bankruptcy thereby. It seems to me

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(1) Law Rep. 5 Ch. 741.

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that under s. 6 of the Bankruptcy Act, 1869, subs. 6, a person served with such a summons, owing the money, and not paying, or securing, or compounding within the seven days, commits an act of bankruptcy absolute and perfect; not inchoate, contingent or defeasible. He may prevent his being adjudicated a bankrupt *at once*, by applying under s. 7, but he nevertheless has committed an act of bankruptcy. This, I own, to me seems plain if the statute is examined. For suppose he applies. If he procures the debtor's summons to be dimissed, of course the act of bankruptcy cannot be relied on to support an adjudication; on the other hand, suppose it is not dismissed, then the Court, as it seems to me, *must* stay proceedings on the debtor's summons, either with or without security from the debtor, but only "for such time as will be required for the trial of the question relating to such debt." By rule 24, if the question has been decided against the validity of the debt, the debtor (sic) shall be entitled to have the summons dismissed. By rule 25, if security has been given by the debtor, the creditor must proceed in a certain time, or the debtor's summons may be dismissed. I find no rule as to what shall be done where the creditor establishes the debt. Rule 43 speaks of proceedings being stayed on a petition. Either that or the principle of it applies; for as the proceedings are only stayed till the debt is established, it follows that he may then proceed, viz., present his petition for adjudication. But that can only be on the ground that there is an act of bankruptcy, yet nothing further has happened to constitute one. This shews, then, that the act of bankruptcy is perfect and absolute at the end of the seven days where the debt is due, and it is not paid, secured, or compounded for. Suppose no security is ordered, or the securities turn out worthless, is the creditor not to be able to make the debtor a bankrupt? Sect. 7 says that the summons is to state that in the event of the debtor failing to pay or compound, a bankruptcy petition may be presented against him. The form No. 4 says, "you will have committed an act of bankruptcy in respect of which you may be adjudged a bankrupt on a bankruptcy petition being presented, unless you shall . . . have applied to the Court to dismiss the summons," i.e., the act will be committed, but adjudication may be prevented by an application to dismiss. No doubt it is strange that, where good security is given, the creditor will have the right to make the debtor a bankrupt, but will have no reason for doing so. But the same consequence may follow in any case where the debtor disputes the petitioning creditor's debt: see s. 9. No doubt, also, it seems strange that a perfectly solvent man, bonâ fide disputing a debt, may in this way be made liable to bankruptcy proceedings. Whether in such case the petition might be dismissed under s. 8, on payment of the debt, it is not necessary to determine. I should think it might be; for under s. 80, sub s. 10, it is certain proceedings might be stayed altogether. It is to be observed that the same difficulty would arise if it is supposed the act of bankruptcy is not complete till the debt is established. Whether the legislature contemplated this or not I cannot say. But let us not make the common mistake of supposing that because they did not intend it, they intended something else, when perhaps the truth is they had no intention in the matter. The words are plain, and the act of bankruptcy has been committed. I think the law was the same before this statute.

But, further, the petition stated the truth. It stated an act of bankruptcy had been committed, but it stated in what way. If it was incorrect, it was in the conclusion it drew in point of law. But it is said it ought to have mentioned the stay of proceedings. As well might it be said that a candid declaration should anticipate the plea and the plaintiff's replication, or an indictment state that insanity was the defence, but unfounded. This was a matter to come from the other side if relied on, and not from the defendant, who, I believe, notwithstanding the finding of the jury, thought it no answer, and who, if he thought otherwise, was no more bound to state it than he was any other matter he might think the plaintiff would rely on. Then it is said, that proceedings being stayed, the petition ought not to have been presented. I think Harvey had a right to present the petition, though it was not right to adjudicate the plaintiff bankrupt on it, at the time he was so adjudicated; Mr. Field pointed out that by s. 6 "no person shall be adjudged a bankrupt on any of the above grounds, unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition." If, therefore, the trial of the validity of the debt did not take place within six months of the seven days, the petition would be presented too late, unless presented before that trial; and if it might be presented at some time before then, it might be at any time. Further, rule 41 does not say that in a case such as this the petition shall not be presented during the stay of proceedings, but that the debtor shall not be adjudged a bankrupt during the stay. Further, a receiver may be appointed before adjudication, as much where the act of bankruptcy is the one in question here, as in the case of any other act of bankruptcy. But for this purpose a bankruptcy petition must be presented. No doubt the latter part of s. 7 says proceedings are to be stayed on security being given, and the order of the 12th of April says that all proceedings on this summons (i.e., the debtor's summons) shall be stayed until the court in which the proceedings shall be taken shall have come to a decision thereon. That order, however, for the reasons aforesaid, is perhaps to be understood with this limitation, that all proceedings other than the presentation of the bankruptcy petition shall be stayed. It is to be observed that the form is as applicable to the case where the petition has been presented as where it has not. So also the statute is consistent with a petition being presented before the security is given, and consequently before the stay operates. Be this as it may, it was for the plaintiff to take the objection. Harvey had a right to the judgment of the Court. Every Court which has ordered a stay of proceedings is competent to limit that stay where justice requires it. Whether, therefore, there was a stay or not of the presentation of a bankruptcy petition, I think Harvey had a clear right to present it, leaving the objection to come from the other side for the Court to deal with. Further, the Court to which the petition was presented, and the registrar particularly, knew the facts.

It is argued that the presentation of the petition and suppression of the stay, *caused* the appointment of a receiver, which was after, and owing to the suppression of the proceedings being stayed. But the appointment of a receiver is not a consequence of the presentation of the petition. It could not be unless there had been such presentation, but it is a consequence of an independent application. It is no more a consequence of the petition than a capias was the consequence of a writ of summons. This was the next step, viz., the procuring the appointment of a receiver, and the taking possession of the plaintiff's goods. This is no part of the plaintiff's complaint, as part of his cause of action. He states it as a consequence of what he complains of, but not as a substantive complaint. This is not a formal objection. Had that been his complaint, the questions and the damages would have been wholly different. I pass it by, then, for the present. The next matter was the hearing and adjudication. It is not pretended that the defendant made any untrue statement on that occasion. He contended that the facts shewed an act of bankruptcy, and a debt, and that Harvey was entitled to an adjudication of bankruptcy on his petition, and the Court so held.

It appears, then, that the defendant has throughout made no false statement, nor suppressed anything he was bound to mention, but put his client's case according to the truth before the Court for its decision. If wrong, the defendant is wrong in point of law. I think where that is the case an action for malicious proceedings without reasonable and probable cause, is not maintainable. If it is in this case, so would it be in case of an indictment. We have no public prosecutor, private prosecutors have trouble enough to encounter, and I think it would be most mischievous if they were to be told that they would be liable if they made a mistake in point of law, and the tribunal agreed with them. An extravagant case has been put of a lawyer of great repute, complaining to and persuading an ignorant magistrate that a larceny had been committed, when there was no pretence for saying so; such a thing would be very discreditable to the lawyer and the magistrate; to the latter for his ignorance or deference to the complainant's opinion. But on principle, it is better that the person wronged in such a case should be without remedy, than that in every case it should be open to a prisoner prosecuted to say that the law was so egregiously mistaken that there was a want of reasonable and probable cause.

But I will take the case another way. I will suppose that a mistake or erroneous contention in point of law may constitute an absence of reasonable and probable cause though the actual facts are truly stated to the tribunal. Is the matter in this case so plain—is the error so gross, that the defendant must or ought to have known he was wrong?

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The wrong is supposed to be in stating that the defendant had committed an act of bankruptcy and in not stating that proceedings were stayed. I have stated the reasons why I think the adjudication should not have taken place. Let us look at some considerations the other way. By the latter part of s. 7 the Court "may *upon* such security being given (if any) as the Court may require, stay the proceedings for such time as required," for the trial as to the debt. It is therefore on such security being given that the stay is to be. Form 9, then, is perhaps wrong. Perhaps it is wrong in four particulars. Perhaps it ought to name a time for giving security. Perhaps it ought to have an interim stay during that time, and such further time as may be ordered. Perhaps it ought to order the stay till trial *on* security being given. Perhaps it ought to give leave to present a petition for adjudication. The form does not do these things. The actual order made, did name a time for giving security—was it so very gross a blunder to interpret it as staying the proceedings for seven days, and then further if security was given meanwhile? Let us see who are parties to this mistake; the plaintiff's advisers in the county court, the judge there, the plaintiff's advisers before the vice-chancellor, the vice-chancellor himself, the special judge in these matters, and the plaintiff's advisers before the lord justice, who alone found out the objection. It is very well now that it is pointed out to say it is clear. Supposing I thought so, I should say the question is not, how it appears to me or the particular judges who decide the case and who may happen to have extraordinary learning and abilities. The question is how such a thing might well appear to this defendant before the matter was pointed out; and then I must see how it appeared to others before whom it came; and seeing how it did appear to them, I cannot say that an opinion shared in by so many was without reasonable and probable cause. So with respect to the act of bankruptcy. I cannot say there was no reasonable and probable cause for saying that one had been committed, for I think there had been. But that ought not to govern this case with the other judges, for I may be making a blunder exceptional, I hope, but too great to be credibly a blunder in any one; but when they come to consider the question they must take the opinion of myself in addition to that of others who have shared it, and ask themselves whether it is a mistake without reasonable and probable cause. I am of opinion then that if a mistake or untrue proposition in law would make liable to an action like this a person who truly stated the fact, there is no such gross mistake or untrue proposition in this case as to shew an absence of reasonable and probable cause. Nor can I, with all respect, agree to the argument urged against the defendant, that if he in fact knew this opinion was wrong he had no reasonable and probable cause, however reasonable and probable the opinion might be. For if the opinion is reasonable and probable where is the evidence he knew it was wrong? There is none.

Further, I think a wrong question was left to the jury—'Did the defendant know that the proceedings were stopped till the registrar should make an appointment for the examination of the sureties, and execution of the bond?' For suppose he did, he had a right to the opinion of the Court on the point on a case truthfully stated, as I say this petition was. A man's rights are to be determined by the Court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court.

I have now some remarks to make as to the appointment of a receiver. Here again I must say that as well as I can judge most clearly a receiver ought not to have been appointed. But here again I can see no blame in the defendant, nor am I sure there was any in Sir R. Harvey. The debt he claimed was clearly due to him. He might well think the defence was not bonâ fide. I will content myself with saying I cannot believe the plaintiff thought his defence a just one; though he may have been told it was good in law. Then Harvey believed that some of the names to the bills were forgeries. Believing this—believing the debt justly due—believing as he well might that its denial by the plaintiff was not bonâ fide, might he not well believe that delay was the plaintiff's object, and delay for the purpose for which delay is often sought by debtors, viz., to misappropriate their effects? I say I am by no means sure that Sir R. Harvey was not justified in wishing to have a receiver. But what did the defendant do? He does not appear to have known the plaintiff's circumstances, nor anything about him, except that he was denying a debt clearly due. Then, when Harvey swore the affidavit, he did it to get a receiver appointed. Can it be said the defendant was wrong in acting as he did? It seems to me impossible to say so. Here again the defendant has made no false statement. If Harvey's affidavit was untrue, it is not shewn that the defendant knew it to be so. All the defendant has done has been to ask the judgment of the Court on the case he presented. Further, this case was presented to the registrar, who knew all that had happened in the court. I confess I think he ought to have refused the receiver on an ex parte application under the circumstances; but if he was wrong it was his fault and not the defendant's. I desire to be understood as speaking with reserve on this point, as it is not specifically before us, and may be the subject of another trial. Moreover, I repeat, that there is no complaint of this in the declaration as a cause of action, and that the verdict cannot be sustained on this ground. Wholly different damages would be given. No question went to the jury on this, and the utmost the plaintiff would be entitled to is a new trial.

On these grounds, I think, there was no absence of reasonable and probable cause. If there was, then there was abundant evidence of malice, or rather malice was proved. Because the case would then be, that unjustifiable legal proceedings were taken to coerce an admission of a debt. Mr. Field in effect admitted this. The attorney, party to this, would be as liable as his client. His duty to his client would no more excuse than would the duty of an assassin to the man who hired him. It would be a duty he had assumed which he was not bound in law to perform, and might have renounced. But for the other reasons I have given, I think this rule should be absolute to enter a verdict for defendant. If there is a scrap of evidence, still the verdict is wrong, and there should be a new trial.

MARTIN, B. This was an action for falsely and maliciously, and without reasonable or probable cause, presenting a petition in bankruptcy against the plaintiff, and procuring him to be adjudged a bankrupt. The facts of the case are very simple and the material ones in writing.

The plaintiff was a trader at North Walsham, in Norfolk, and a customer of the Crown Bank of Norwich, which had a branch at North Walsham. The late Sir Robert Harvey was the senior partner in the bank, and is alleged to have been a man of very imperious and domineering temper. The bank claimed a balance of upwards of 400*l.* to be due by the plaintiff on a banking account; but the plaintiff denied the debt, and insisted that nine dishonored bills of exchange which he had paid into the bank, but which he had not indorsed, operated as payment or satisfaction. It may here be stated that this question has been the subject of an action in this Court, and that there was not the slightest pretence for the allegation that these bills operated as payment.

The defendants are attorneys at Norwich, and Sir Robert Harvey, in the beginning of March last year, instructed them to make the plaintiff a bankrupt. They proceeded to do so, and their first step was by a letter of the 4th of March, 1870, wherein they demanded payment of the debt. Payment not being made, they, upon the 26th of March, applied to the County Court of Norfolk, holden at Norwich, which Court had jurisdiction in the matter, for a debtor's summons under the 7th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71.) The summons was granted and duly served upon the plaintiff. Under the same section the plaintiff was entitled to apply to dismiss the summons, and he did so, and upon the 12th of April all the parties, Sir Robert Harvey, and the defendant Sparrow as his attorney, and the plaintiff and his attorney, attended before the registrar (see s. 67) and upon that day an order was made sealed with the seal of the Court, and signed by the registrar "that the plaintiff should within seven days from the service of the order, enter into a bond with two sufficient sureties as the Court should approve, to pay such sum as should be recovered by Messrs. Harvey in any proceeding to be taken against the plaintiff for the recovery of the debt, together with costs." And it was further ordered "that all proceedings on the summons should be stayed, until the Court in which the proceedings should be taken should have come to a decision thereon." Mr. Sparrow, one of the defendants, prepared the order. It was the first order of the kind made by the Court, and it was proved that the attorney in the proceedings usually prepares such documents.

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It is said that the order is not in accordance with the 162nd rule made under the authority of the Bankruptcy Act, 1869, and it may be so; but a clerk of the attorney for the plaintiff was before the registrar, he did not object to it, on the contrary he appears to have acquiesced in it, and gave the names of the sureties, one of whom was Mr. Hand, the plaintiff's attorney. It does not seem to me material to consider whether this order was in a proper form or not. It was an order made by a Court of Record of competent jurisdiction, and I think it is a valid order until it be set aside by the Court itself (s. 71) or by a Court of Appeal, which it never has been; on the contrary it was acted upon by Lord Justice James, who, upon the clause in it as to the stay of proceedings, set aside the adjudication of bankruptcy of the plaintiff hereinafter stated. The order was duly served upon the plaintiff. During the seven days a correspondence took place between the defendants and Mr. Hand, and in one of the letters, the defendant wrote that the registrar objected upon principle to the attorney for the alleged debtor being one of the sureties. The other surety was also objected to, and in the result no bond was executed within the seven days, which expired on the 19th.

Upon the 21st, by the express direction of Sir Robert Harvey, a petition in bankruptcy was presented by the defendants and served upon the plaintiff. Upon the same day an order was made by the Court under the 13th section, appointing a receiver and directing immediate possession to be taken of the plaintiff's property, which was done. The act of bankruptcy alleged was, that the petitioning creditor had served on the plaintiff a debtor's summons, and that he being a trader had for seven days neglected to pay the debt, or secure or compound for it (s. 6, subs. 6). The plaintiff objected to the petition, which he was entitled to do under the 8th section, and several hearings took place before the learned judge of the county court himself, and the result was that upon the 8th of May he adjudged the plaintiff to be bankrupt. The order is under the seal of the Court, and is signed by the judge, and states that proof satisfactory to the Court of the debt of the petitioner, and of the trading, and the act of bankruptcy alleged to have been committed, having been given, "it is ordered that the plaintiff be and he is hereby adjudicated bankrupt."

The order was duly gazetted and advertised. It does not seem to have occurred to any one before the matter came before Lord Justice James, that the order of the 12th of April was a stay of proceedings, nor did the plaintiff propose before the county court judge to give a security in order to have the question relating to the debt tried. He proposed to give a charge upon some mortgaged property, which will hereafter be referred to, but this Sir Robert Harvey refused to accept. The plaintiff was dissatisfied, and appealed to the Chief Judge in Bankruptcy; first, to rescind the order for the receiver, and secondly, to annul the adjudication. Both were argued by counsel and both dismissed with costs. Again no complaint seems to have been made that the order of the 12th of April was a stay. The question discussed seems to have been whether there was an act of bankruptcy. Another appeal was then made to Lord Justice James, who annulled the proceedings upon the ground that the order of the 12th of April was a stay at the time of the petition and adjudication. (1) An application was made to the Lords Justices for leave to appeal to the House of Lords, which they refused, and thereupon this action was brought.

The cause came on to be tried before the Lord Chief Baron at Guildhall, and at the conclusion of the plaintiff's case the learned counsel for the defendants applied for a nonsuit. The learned judge stated his opinion to be that there was no evidence against Mr. Emerson, but that there was evidence against Mr. Sparrow, but reserved his judgment until after the evidence for the defence had been given. At the conclusion of the case he directed the jury to find a verdict for the defendant Emerson, and gave leave to the defendant Sparrow to move to enter a verdict for him, and left three questions to the jury. First, did the defendant personally participate and act in the instituting and carrying on the proceedings in bankruptcy, apart from the instructions of his clients, and of his own accord. Second, was the defendant actuated by malice, that is as explained, by any undue and improper motive, as, in order to please his clients, to coerce the plaintiff into the acknowledgment of a doubtful debt and one which he denied to be due. Third, did he know or believe when he filed the petition in bankruptcy that the proceedings to obey the order of the 12th of April, and any further proceedings in bankruptcy were stopped until the registrar should make an appointment for the examination of the sureties and the execution of the bond? The jury found them all in the affirmative, and assessed 1500*l.* damages, and the verdict was entered for the plaintiff for that sum.

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(1) Law Rep. 5 Ch. 741.

A rule was moved for on behalf of the defendant Sparrow, to enter the verdict for him, and also for a new trial. It has been argued, and I am of opinion that it ought to be made absolute to enter the verdict for the defendant, upon the ground that there was no evidence to go to the jury to support the cause of action alleged in the declaration.

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It was said, and truly, that the proceedings in bankruptcy were very harsh proceedings. Bankruptcy is the proper step when a man is so largely indebted that all his property is required to pay his creditors, and ought not to be had recourse to when payment can be enforced by an execution in an ordinary action at law. In this case also, Sir Robert Harvey had in mortgage property of the plaintiff which he must have known would have been ample security for the banking account, but this security he refused to accept. All that can be said for him is, that probably he was very angry and indignant at the defence set up by the plaintiff to the debt due to the bank; but as regards the defendant, the evidence is that the refusal to accept the mortgage security was the personal act of Sir Robert Harvey himself.

The nature of the present action is well understood, and is explained in the notes to *Skinner* v. *Gunton.* (1) It is part of the liberty of the law that any man may prefer an indictment against another for an alleged crime, but when the indictment is disposed of in favour of the accused, he may maintain an action of tort for damages, provided he can establish that the charge was false and malicious, and without reasonable or probable cause. Upon the same principle, although no action is maintainable for the mere bringing a civil suit, however groundless and malicious, yet formally, if the suit was commenced by capias followed by arrest, a similar action was maintainable; and so also in cases of bankruptcy under the old law, when the proceeding was false, malicious, and without reasonable or probable cause, an action could be maintained. At the time when this action was first applied to cases of bankruptcy, the proceeding to make a man bankrupt was ex parte. The petitioning creditor was said to strike the docket. But under the present law the petition is to be heard before a Court of Record. The debtor must be served with the petition, and has a right to appear before the Court, and contest the matter by attorney or counsel. The Court is required to hear evidence, and if satisfied with certain proofs to adjudge the debtor to be bankrupt; and if not satisfied, may dismiss the petition with costs (s. 8). The act of adjudication is therefore a judicial act.

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(1) 1 Wms. Saund. 228 d. et seq.

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As has been already said, it was incumbent upon the plaintiff to give evidence that the proceeding of the defendant was false and malicious. I think these words mean that the proceeding was not merely groundless and without foundation in law, but that it was so to the knowledge of the defendant, or, what is the same thing in matters of this kind, that a reasonable and sensible man, knowing the facts and circumstances which the defendant did, would have formed the conclusion that the proceeding was groundless. They also mean that it was malicious. Malice in a legal sense means a wrongful act done intentionally without just cause or excuse: *McPherson* v. *Daniell* (1); and I quite agree that if an attorney, knowing a proceeding in bankruptcy to be groundless, presented a petition, either from the motive of gain to himself, or in obedience to the instructions of an oppressive and vindictive client, it would be in law a malicious act. And if the present case depended upon whether there was evidence to go to the jury that the acts of the defendants were malicious, I think there was. There was the act of inserting the provision as to the seven days in the order of the 12th of April, although I myself believe this was an innocent act; there was the objecting to Mr. Hand as a surety, and apparently stating untruly that the registrar objected to him; this I also believe to be an innocent act; indeed the effect produced on my mind by the letter was that it was a friendly one. But there was the act of procuring the appointment of receiver, and there is the alleged motive that the proceeding in bankruptcy was not for the real and bonâ fide object of carrying out a bankruptcy, but in order to obtain the admission of a debt. The question here is not what conclusion I myself would draw from the facts, but whether they were evidence to go to the jury of malice, and I think they were.

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(1) 10 B. & C. at p. 272.

But I think there was no evidence that the defendant knew, or that a reasonable and sensible man possessing the same knowledge he did would have known, that the proceeding in bankruptcy was groundless and without foundation. On the contrary, I think the evidence shews that he believed the proceeding was well founded. The judge of the county court and the Chief Judge in Bankruptcy, with the same knowledge that the defendant had, were of the same opinion. To have legally made the plaintiff bankrupt, three facts must have existed: First, that he was a trader, which it is admitted he was. Secondly, that there was a good petitioning creditor's debt; this there was beyond all cavil or doubt; it was decided to be so by the judge of the county court; it does not appear to have been disputed before the Chief Judge in Bankruptcy; and it has been the subject of an action in this court, and has been judicially before it, and we were all of opinion that it was a good debt, and that the supposed defence to it was groundless, in my opinion, frivolous. Thirdly, I think there was an act of bankruptcy; there had been served upon the plaintiff a debtor's summons requiring him to pay the debt, and he had for seven days neglected to pay it, or secure, or compound for it. This is an act of bankruptcy (s. 6, subs. 6), and such was the opinion of the Chief Judge in Bankruptcy. (1)

That which caused the petition and adjudication to be set aside had nothing to do with the real merits, it was that in the order of the 12th of April there was a stay of proceedings, and should there be a new trial this may be a not unimportant circumstance: see *Wilkinson* v. *Howel.* (2)

In my opinion there is not only no evidence that the defendant knew or believed that there was a stay, but there is strong evidence to the contrary. The plaintiff and his legal advisers knew the contents of the order, and in the proceedings before the county court judge and the Chief Judge in Bankruptcy, it never occurred to them that the petition and adjudication were wrong or irregular,

(1) See ante, p. 330, n.

(2) M. & M. 495.

nor did it occur to these learned judges themselves, both of whom had the order before them. What reason is there, then, for assuming that the defendant knew it? I think his conduct shewed the contrary, and that there is, therefore, no evidence that his conduct was false or malicious within the meaning of these words in the declaration.

But I further think that he had reasonable and probable cause, or rather that there was no want of reasonable and probable cause. The order is, as I have said, a valid order until it be set aside; it was made under the last paragraph of the 7th section, which enacts that the Court may require a security to be given for the debt, and that *upon such security being given*, the Court may stay proceedings upon the debtor summons. Now this order was, that the security should be given within seven days, and I think the defendant may not unreasonably have supposed and believed that, the security not having been given within seven days, the stay of proceedings was gone, and that he might lawfully proceed with the petition. I, therefore, further think that there was no evidence of want of reasonable and probable cause, which is an essential ingredient in this action. This is a question of law: *Panton* v. *Williams.* (1) The plaintiff's case rests upon the order of the 12th of April; it was before two learned judges, sitting in and forming, as to one of them, one of the highest courts of justice in the kingdom; it is not imputed that the defendant concealed or kept back it or anything else from them; and it would be extraordinary when those two judges adjudged that there was lawful cause for the petition and adjudication, that we, upon the construction of the same order, should adjudge that the attorney had not reasonable and probable cause for thinking so. It seems to me that to do so would be inconsistent and repugnant. I am, therefore, of opinion that there was no evidence to go to the jury, and that the Lord Chief Baron should have so held at the trial.

But I am also of opinion that there was misdirection as to the first question that was left to the jury. I am not aware what the evidence was as to the acts of the defendant of his own accord and apart from the instructions of Sir R. Harvey. It is difficult to collect from the reading of a long note all the evidence in a cause,

(1) 2 Q. B. 169.

and there may have been evidence upon this point, although I did not apprehend it; the Lord Chief Baron will no doubt refer to it in his judgment.

As to the second question, I think there was misdirection. The debt due by the plaintiff to the bank is assumed to be a doubtful debt. There is no ground for supposing it to have been of this character, or in the least doubtful. It was as undoubted a debt as ever existed, and the supposed defence to it, in my opinion, frivolous. I cannot myself imagine how any man could have supposed that a dishonoured bill paid into a bank operated as payment of an advance in cash made by the bank to the customer. I think the jury ought to have been told this, and that it is material in such a case as this that they should have been told that there was no doubt as to the evidence of the debt.

As to the third question, as I have already stated, I think there was no evidence to go to the jury that the defendant knew or believed when he filed the petition that the proceeding was stayed. I think the evidence is to the contrary, and that until the hearing of the appeal before Lord Justice James, no one knew or believed that there was any stay at all.

This is an unfortunate case. The first blame, in my opinion, rests upon the plaintiff. I think a customer of a bank who insisted that his balance was paid by dishonoured bills would irritate any banker, much more so such a man as Sir R. Harvey is said to have been; and it is clear that he suspected the bills to be forgeries; but, as I have already said, I think the proceeding in bankruptcy, although lawful, was harsh and oppressive. I also think the requiring a receiver to be appointed was, under the circumstances, a very harsh and oppressive act. I do not myself believe there was any intention by the defendant to coerce the plaintiff into an admission of the debt; it seems to me that Mr. Emerson's account of the letter and transaction of the 30th of May is true, and that he was sincerely desirous to calm down and propitiate Sir R. Harvey, and relieve the plaintiff from the bankruptcy. It was most unfortunate that the proceeds of the sale of the plaintiff's property should have been paid into the Crown Bank. But there was no bank in the kingdom in higher credit than it up to the time of Sir R. Harvey's death, and it is a matter of satisfaction that the plaintiff has to a very considerable extent been relieved from this step by a recent judgment of this Court. (1)

I cannot conclude this judgment without adding that I entertain great doubt whether the action be maintainable at all. The liability of the defendant depends upon the answer of the jury to the third question; had it been in the negative there would have been no cause of action, and the Chief Baron would have directed a verdict for the defendant. I have said I am of opinion there was no evidence to go to the jury upon it; but assuming that there was, and the finding of the jury to be right, the case against the defendant, stripped of matter irrelevant and of mere prejudice, is this:—A creditor, having a debt due to him to an amount sufficient to support a petition in bankruptcy, employs an attorney to take proceedings in bankruptcy against the debtor. This he may lawfully do. The attorney proceeds by debtor summons under the 7th section. The debtor applies to the Court to dismiss the summons under the same section. The Court, being a court of record, and having jurisdiction in the matter, hears both parties and their legal advisers. The attorney acting for the petitioning creditor, and the debtor, having, by the 70th section, the right to be heard by counsel or advocate, the Court adjudicates upon it, and makes the order of the 12th of April. Now assume that this order was a stay of proceedings, and that the attorney knew it. A copy of it is served upon the debtor, and he and his legal adviser know its contents as well as the attorney for the petitioning creditor, but the latter, notwithstanding his knowledge of the stay, presents a petition in bankruptcy under the 8th section. I think the mere presenting the petition would be no cause of action, it would be analogous to the issuing a writ of summons for an alleged cause of action, which was known to be groundless and without foundation, which affords no cause of action. It possibly might be the ground of an application to the Court against the attorney for contempt, but nothing more. But, again, the petition is the subject of judicial inquiry and judgment by the Court. There is a hearing; the attorney appears on behalf of the petitioning creditor, and advocates his case; the defendant appears with his legal adviser who advocates his case; evidence is given and heard, and the order of the 12th of April, containing the stay of proceedings, is laid before the Court, and the legal adviser and advocate of the debtor is in possession of a copy of it. The case on both sides is closed, and the Court delivers judgment, and adjudges that the debtor is bankrupt. This adjudication is afterwards annulled by a Court of appeal, upon the ground that there was a stay of proceedings at the time it was made. The question is, whether an action lies against the attorney for falsely, fraudulently, and without reasonable and probable cause, procuring the adjudication. One of two states of things may have happened before the Court; the legal adviser and advocate for the debtor may have objected that the order was a stay, and the attorney or advocate for the petitioning creditor may have said the contrary, and argued that it was not, notwithstanding that he knew better (a thing not very uncommon in advocacy), and the Court may have thought the argument of the attorney for the petitioning creditor the more convincing, and decided erroneously that there was not a stay, and proceeded to adjudicate. Under such circumstances I cannot think an action could be maintained against the attorney. Courts (the very highest) have many times given wrong judgments, and advocates have many times argued before Courts to induce and persuade them to give judgments, which they well know would be wrong if given, and occasionally have succeeded; but no one ever heard of an action against the advocate for falsely and maliciously and without reasonable and proper cause procuring the Court to give a wrong judgment. The other state of things may have been, that although the order creating the stay was before the Court and a copy of it in the possession of the plaintiff and his advocate, that neither of them noticed or apprehended that it was a stay, and no objection was raised to the adjudication upon this ground. All that can be imputed to the attorney for the petitioning creditor is, the not having called the attention of the Court to the order, and saying that in his opinion there was a stay of proceedings. His state of mind is assumed to be knowledge, but it cannot be more than strong conviction and opinion. Under such circumstances (which as regards the Court and the plaintiff and his legal adviser were, I believe, the true circumstances), is the attorney subject to a legal obligation or duty towards the debtor to call the attention

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(1) *Bailey* v. *Johnson*, ante, p. 279.

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of the Court to the order, and state his opinion upon it? He did not tell what he knew, or rather, what he thought and believed, but he concealed and kept back nothing "unum est tacere aliud celare." The case of *Farley* v. *Danks* (1) was referred to in the argument. Lord Campbell there states that, "if a person truly states certain facts to a judge, who thereupon does an act which the law will not justify, the party is not liable, because in that case the grievance complained of arises not from the false statements of the party but from the mistake of the judge." In the present case the defendant seems to have stated every fact he knew to the learned judge of the county court. It is not imputed to him that he kept back any fact whatever. It is assumed against him (I think without evidence) that he knew the order of the 12th of April was a stay; but he laid it before the learned judge, and all that can be charged against him is, that he knowing (which must here mean being of opinion or believing) that the order operated as a stay, did not state his opinion or belief to the judge.

In my opinion, therefore, the legal obligation upon which the action depended is, to say the least, doubtful, and this question has never been raised or argued at all. When actions of this nature were first applied to cases of bankruptcy, the initiatory step was striking a docket and issuing a commission; this was ex parte, and the petitioning creditor and his attorney may truly, and in the ordinary language of mankind, be said to have caused the debtor to be made bankrupt. But the existing state of things is quite different. By the 8th and 9th sections a proceeding to make a man bankrupt is a judicial proceeding; there is to be a hearing before a court, and evidence and proof given, and the court, if satisfied with the proof, is to adjudge the debtor to be a bankrupt, otherwise to dismiss the petition, with or without costs as it may think just. The Court is constituted by the 59th and following sections, and the scope of them is that the kingdom is divided into districts, one called the London Bankrupt District, and the others the local districts; the court of the London district is to consist of a judge to be called the Chief Judge in Bankruptcy, who is to be one of the judges of the superior courts of common law or equity, and is to be a principal court of record; and the

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(1) 4 E & B. 493; 24 L. J. (Q.B.) 244. 1 Jur N.S. 882.

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orders of such judge are to be of the same force as if they were judgments of the superior Courts of common law or decrees in the High Court of Chancery. The local courts consist of a county court judge, who, in addition to his ordinary power as such, has all the power and jurisdiction of a judge of the Court of Chancery; and by express provision (s. 71), every Court having jurisdiction in bankruptcy may review, rescind, or vary its own orders, so that the county court judge of Norfolk, who had made the order of the 12th of April, had power to rescind or vary it. But, as I have said, it seems to me that no other Court, except itself, or a Court of appeal from it, had any jurisdiction over it, but is bound to accept it as valid. So also, as regards the petition and adjudication, the local Court has the same jurisdiction as the London Court. The jurisdiction to both is given by the same section in the same words, and if this action be maintainable it would be so if the matter had occurred in the London court. The adjudging a debtor to be bankrupt is called an order (s. 10); and by s. 65, if made by the London Court, is to be of the same force as a judgment of a superior Court of common law. I believe no one ever thought that an action could be maintained for falsely, maliciously, and without reasonable and probable cause, procuring a judgment of one of the superior Courts at Westminster; and upon consideration it may be found that no such action will lie in respect of a judgment or order of a Court of bankruptcy having jurisdiction to hear and adjudicate upon the matter. The reason may be that the judgment of a Court is not caused or procured by anyone. It is the independent exercise of the mind of the Court upon the facts before it, and cannot be said to be caused or procured in the sense in which these words are used in such actions as the present. I do not think it right to pursue the subject further, but I would refer to the principles laid down in the cases, *Cooper* v. *Harding* (1), *Williams* v. *Smith* (2), and especially in *Daniels* v. *Fielding* (3) as affording the true guide. I think the rule ought to be absolute to enter a verdict for the defendant.

KELLY, C.B. This is a case of great complexity, and of very considerable difficulty; a case in which it is necessary to consider with attention the state of the proceedings, and the legal and actual condition of the parties, at each successive stage and period of the transactions which are the subject of inquiry.

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(1) 7 Q. B. 928. (2) 14 C. B. (N.S.) 596. (3) 16 M. & W. 200.

It may be convenient to consider, in the first place, the several questions of law which arise in this case, apart from the particular facts upon which it is sought to make the defendant liable to this action. And of these the first, which lies at the root of the entire case, is, whether any act of bankruptcy was ever committed by the plaintiff at all. And first, had he committed an act of bankruptcy on the expiration of the seven days from the service of the debtor's summons, that is to say, on the 5th of April? Or, did the application upon the 2nd of April, before the expiration of the seven days, suspend the operation of the debtor's summons, and stay all proceedings upon it from that day until that application should be finally disposed of?

The facts of the case upon which these questions arise are short and simple. Messrs. Harvey & Hudson, the petitioning creditors, of whom Sir R. Harvey was the principal acting partner, claimed a debt of £453 against the plaintiff. The plaintiff denied that be owed the debt, and refused to pay it. The bankers thereupon, by the defendant Sparrow as their solicitor, obtained a debtor's summons against the plaintiff, which they served upon him on the 28th of March, 1870. The seven days, therefore, expired on the 4th of April. An application to dismiss the debtor's summons, founded upon an affidavit that the debt was not due, was made and served on the 2nd of April, and an appointment was made for the hearing of the application on the 12th of April. On the same 12th of April an order was made that a bond, with sureties, be executed within seven days of the service thereof, and that an action should be tried to determine whether the debt was due. There was also a clause staying all proceedings till after the trial of the action. This order was served on the 13th of April. The debtor gave notice of the sureties to the petitioning creditor and to the registrar by letters of the 16th of April, which were delivered and received on the 18th. The registrar, having then two days and no more within the seven to appoint a time and place for the execution of the bond, made no appointment, and the seven days expired on the 20th. On the 21st the petition was filed, upon an affidavit that an act of bankruptcy had been committed by the non-payment of the debt within seven days of the service of the debtor's summons. On the same 21st of April the appointment of a receiver was obtained ex parte, and the property of the debtor seized. The petition came on for hearing upon the 7th of May, when the plaintiff was adjudicated a bankrupt.

If, upon the construction of the statute, a complete and perfect act of bankruptcy was committed on the 21st of April, upon which a petition might lawfully be filed, and an adjudication in bankruptcy afterwards pronounced, it at once puts an end to the case, and the rule should be made absolute to enter the verdict for the defendant. But I am of opinion that the application of the 2nd of April to dismiss the debtor's summons, founded upon an affidavit that the debt was not due, at once and of necessity stayed all proceedings in bankruptcy, and suspended the operation of the debtor's summons itself until that application should be finally disposed of according to law, either by the dismissal of the debtor's summons, or of the application, or by an order to stay proceedings until after the trial of an action.

It is obvious that, if the effect of the application to dismiss the debtor's summons was not to stay all proceedings in bankruptcy until it should be disposed of, the several provisions in the Act of Parliament, and the rules for proceeding upon a disputed debt, are wholly nugatory and inoperative. And if such be the case, the strange result might follow that the proceedings to an adjudication might have been carried on pari passu with the application to dismiss the debtor's summons, and the judge might pronounce for an adjudication, and the registrar order a stay of proceedings till after the trial of an action, or even dismiss the debtor's summons on the same day. It may be said that this could not happen, inasmuch as the whole of the proceedings are in the same court, and are in contemplation of law, and might be in fact, before the judge. But this only shews that the Court, or two different officers of the Court, the judge and the registrar, might be called upon to make two orders inconsistent with each other at the same time; the one, that a petition upon an affidavit that an act of bankruptcy had been committed by non-payment of a debt within seven days of the service of the debtor's summons, may be received, and sealed, and served with a view to an adjudication; the other, that the debtor's summons be dismissed with costs, on the ground that no debt is due.

But if the application founded upon the affidavit operated of itself as a stay of proceedings, and no act of bankruptcy had been committed on the 5th, the question arises, whether an act of bankruptcy had been committed by the plaintiff on the 21st of April, by reason of the lapse of seven days from the service of the order of the 12th, no bond with sureties having been within that time executed.

Now it appears to me that we have only to look to the plain and express terms of the Act of Parliament, and the forms and the rules bearing upon this question, to be satisfied that no act of bankruptcy whatever had been committed by the plaintiff; that he had, from the 2nd of April until the 21st, strictly conformed in all things to their provisions, and that upon justifying his sureties and executing the bond, if a time and place had been appointed, he would have clearly entitled himself to a stay of all proceedings whatever against him until an action upon the debt should have been tried. The 7th section of the Act, the form of the debtor's summons, and the endorsement upon it, the rules pointing out the mode of proceeding upon an application to dismiss the debtor's summons, and especially rule 162, appear to me clear and decisive upon this question. It is s. 7 of the Act which enables a creditor to obtain a debtor's summons, and to petition for an adjudication in case of non-payment of the debt, or non-compounding for it within the time specified in the summons. Then the 2nd branch of the 7th section enables the debtor, on making oath that the debt is not due, to apply to the Court to dismiss the summons; and, by the express terms of the Act, the application is to dismiss the summons, not merely if the debt is not due at all, but if "he is not indebted to such an amount as will justify the said creditor in presenting a bankruptcy petition against him." So that "the presenting a petition" is unjustified and unlawful, if no debt, or no debt to a sufficient amount, be due. And as no petition can be presented without an affidavit founded on the summons, that the debt is due and that it has not been paid within the seven days, how can a petition be lawful while the application upon that summons is pending to determine whether it is due or not?

But the latter part of the 1st branch of the 7th section, and the form (No. 4) of the debtor's summons, and of the indorsement upon it, are conclusive upon this point. The 7th section says that the summons shall have such an indorsement upon it "as may be best calculated to indicate to the debtor the nature of the document served upon him, and the consequences of inattention to its requisitions." Then the form (No. 4) is, "we warn you that unless you pay, &c., or compound, &c., you will have committed an act of bankruptcy, in respect of which you may be adjudged a bankrupt on a bankrupt petition being presented, *unless you shall have within the time aforesaid applied to the Court to dismiss this summons, on the ground that you are not indebted to him in the sum claimed.*" And the indorsement upon the debtor's summons further states: "If, however, you are not indebted, you must make application to dismiss this summons by filing an affidavit that you are not so indebted with the registrar, who will thereupon fix a day for the hearing of your application." The having committed an act of bankruptcy, therefore, and the liability to a petition is only to be, "*unless he should have applied within the time, to dismiss the summons.*" An indorsement in the very terms before mentioned is upon the summons served upon the plaintiff, and the plaintiff did, accordingly, within the seven days, make and serve the application upon the registrar to dismiss the summons. So that, upon the construction contended for, the debtor is in this position: The Court says to him, "If you don't pay or compound for this debt, or unless you apply to dismiss this summons, you will have committed an act of bankruptcy, and are liable to a petition and to be adjudged a bankrupt; but although you do apply to dismiss the summons, and within due time, and are prepared to support your application, you will nevertheless have committed an act of bankruptcy, unless you pay or compound for the debt, and a petition may be presented against you." This cannot be; and, indeed, neither Sir R. Harvey nor Mr. Sparrow seems to have thought of making the plaintiff a bankrupt, and presenting a petition on the 5th of April.

We have therefore next to consider whether he had committed an act of bankruptcy which authorized the petition and the other proceedings on the 21st of April. The plaintiff having, as observed, made this affidavit and application, the registrar appoints the 12th of April for the hearing. On this day the parties met before the registrar, who considered it a case in which, the debt being doubtful, he ought to call upon the debtor to give a bond with sureties to pay the debt, if it should be established in an action to be brought, together with the costs, and with a stay of proceedings until the action should be determined. And here commenced a series of errors and blunders, hereafter to be more particularly considered, and which would seem to be incredible but that they actually occurred. The 7th section so often referred to, the form of the debtor's summons, and the indorsement upon it (No. 4) the rules 22, 23, 24, 25, 41, 43, 44, 158, 159, 160, 162, 163, but especially rule 162, and the form No. 9, point out and determine what is to be done, from the time when the application is made until it is finally disposed of, either by the dismissal of the debtor's summons, or the dismissal of the application itself, or by an order providing for the giving of a bond with sureties and the trial of an action to establish the debt. And the provisions touching these proceedings are clear and simple in the extreme, save that the form No. 9 is so inaccurately framed as to create an apparent difficulty, but which, with a little consideration, may be easily overcome. The course pointed out, and that ought to have been pursued, is plain and clear. The 162nd rule admits of no possible misconstruction. It is in these words:—"In all cases where a person proposes to give a bond by way of security, he shall serve by post or otherwise on the opposite party, and on the registrar at his office, notice of the proposed sureties according to the form set forth in the schedule, and the registrar shall forthwith give notice to both parties of the time and place at which he proposes that the bond shall be executed, and shall state in the notice that should the proposed obligee have any valid objection to make to the sureties or either of them, it must then be made." When the registrar, therefore, had decided upon the security and the trial of an action, and supposing he had authority, as I think he had, to prescribe a time for the giving notice of the sureties, the order should have been that upon the execution of a bond with two sureties to be approved by himself at a time and place to be by him appointed, proceedings should be stayed till after the trial of an action upon the debt; and that unless the debtor should give notice within so many days, or in case he should fail to execute the bond with sureties to be approved by him at the time and place appointed, the application to dismiss the debtor's summons do stand dismissed.

But instead of this the order was made according to the form No. 9, with the addition of the seven days' clause, which in its terms was totally unauthorized. If it had been as prescribed by the form No. 9 without the seven days' clause, its effect would have been consistent with the Act and the rules, though it would have been inaccurately expressed; for looking to the form No. 9, we certainly find that the order is absolute in its terms, that the said debtor enter into a bond with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered in the action. This no doubt is incorrect and calculated to mislead, for the registrar has no power to order a bond to be executed, but may only direct that on a bond being executed according to the statute and the rules, the proceedings shall be stayed, or that otherwise the summons shall be dismissed. Still if this order had been strictly according to form No. 9, it might have been well and easily obeyed. For the parties who had to act upon it must have looked to rule 162 to see how the bond was to be executed, and would there have found the whole proceeding by all the parties distinctly pointed out. The notices of the sureties could then have been given, the appointment for the execution of the bond made, and at the meeting so appointed, the bond would have been executed and the proceedings stayed, or the application would have been dismissed. And such would have been a reasonable and by no means a forced construction of such an order. But unfortunately when the order was about to be drawn up, although it was the first occasion upon which such an order was to be made under the new Bankruptcy Act, and it therefore required the utmost care and attention, the registrar committed the preparation of it to the defendant, the solicitor to one of the parties; and between them, and it is said upon the suggestion of the registrar himself, who, if it be so, must have been guilty of the most unpardonable inattention to the duty which he was performing, this limitation of seven days was introduced into the order as the time, not within which notice of the sureties was to be given, but within which the debtor was ordered to execute the bond. From thus adopting the form 9, which in itself would have been harmless, but with the addition of the seven days' clause, the order before us was made. But being so made, I think it was the duty of all parties, but more especially of the defendant, who had himself prepared the order, so to construe and act upon it as to conform in all things to the statute and the rules. And this he might well have done, though construing it in the strictest and severest sense against the plaintiff, by treating it as an order that the plaintiff should give notice of his sureties in sufficient time to enable the registrar, upon receipt of such notice, to appoint a time and place for the execution of the bond within the seven days, and that then and there, if the sureties should prove sufficient, the bond should be executed and the proceedings stayed; or, if such notice should not be given, or the sureties should be insufficient, that then the application should be dismissed. And had this plain and reasonable construction been adopted, when the plaintiff had given the notices in due time, both he and the defendant might reasonably have expected that the registrar would enlarge the time, or make the appointment for the last of the seven days; and if he had failed to do the one or the other, it was then for him to take such steps as he might think necessary to repair the omission, or for either party who desired to expedite the proceedings to apply to him to do so. This was, I think, the only reasonable and just construction of the order. But the construction for which the defendant must contend, and upon which alone he can justify his acts, is to treat it as an order to this effect:—"Ordered, that pursuant to the statute s. 7, and rule 162, the debtor do within seven days execute a bond with sureties approved by the registrar, that is to say, that the debtor do, within a reasonable portion of the seven days, give notice of his sureties, and that the registrar do thereupon appoint a time within the seven days for the execution of the bond, and that if the debtor shall within such reasonable portion of the seven days give due notice of the sureties, but the registrar shall fail thereupon to appoint a time for the execution of the bond within the seven days, and therein shall make default, the debtor shall be deemed to have committed an act of bankruptcy, and thereupon the creditor may petition against him and cause him to be adjudicated a bankrupt." It is surely impossible to argue that such can be the construction of this order, which implies that a superior Court of justice has made an order authorizing one man to violate the law or compelling another to perform an impossibility.

But here a most extraordinary argument has been urged at the bar, which I should have thought it unnecessary to notice but that it is said upon the authority of a shorthand note to have been somewhat countenanced by the learned and eminent Chief Judge in Bankruptcy. (1) I think the note must be incorrect, or that the remark must have been made before the rule 162 had been brought before him. The argument is, that when the plaintiff found the bond could not be executed within the seven days he should have applied to the registrar for further time. But in the first place, when did he find this? He had on the 16th sent the notices of his sureties to the creditor and to the registrar. He knew (Easter Sunday intervening) that they would be received on the 18th and that the registrar might have appointed the 20th for the execution of the bond. What right or reason had he to expect that as this was the last day, if it was necessary that the bond should be executed on that day, that the registrar would not appoint it? Suppose he had appointed it? The plaintiff was ready and would have attended, and the bond would have been executed. But he received no appointment; and what was he to do? He could not know until the 19th or the 20th whether that day would be appointed or not. But he was to apply for time. When? He could not until he had given notice of his sureties, and it had been received, that is, on the 18th, and ought he to have applied then? would his application have been right and proper? would it not have been in effect this? "Sir, I have given you notice of my sureties, and it is now your duty to appoint a time and place for us all to attend. The words of the rule are, 'The registrar *shall* thereupon forthwith appoint,' and so be pleased to appoint accordingly, and inasmuch as you have made this order

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(1) See ante, p. 330, n.

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that all this is to be done within seven days, I would suggest to you to enlarge the time or you may disobey your own order." When this, the real state of things, is calmly considered, the discussion really becomes ludicrous. The plaintiff is to ask for time. Why, and for what purpose? That the registrar may do his duty. But again, why should the plaintiff ask for time? He wanted none. He had done his duty and was content to wait till the registrar had done his. If the petitioning creditor wished to expedite the proceedings, he might have applied to the registrar to make the appointment, but nothing more than the services of the notices having been done, and as the next step by which alone it was possible that the order should be obeyed must have been taken by the registrar, it was his default and not that of the plaintiff which prevented the order from being obeyed; and I feel bound to declare my conviction, that not only no judge and no lawyer, but no man of ordinary intelligence, with this 162nd rule before his eyes, could believe for one moment that this man could be made a bankrupt because the registrar had been guilty of this default. I ought perhaps in justice to the registrar to correct this expression, because I am far from saying that he made any default at all. He received the notices on Easter Monday, and the seven days expired on the Wednesday; and although it would have been better, looking to the strange and unauthorized language of the order, that he should have notified to the parties that some delay must take place, he might well have disregarded or corrected the terms of his own order, and appointed some four or five days later, when the bond might have been executed and the whole business satisfactorily concluded.

Upon the grounds, therefore, before pointed out, I am of opinion that upon the true construction of the statute and the rules, together with the orders which have been made, the application to dismiss the debtor summons on the 2nd of April suspended its operation and stayed the proceedings, until that application should be followed by a final order, or should be dismissed; that the plaintiff having done all that was incumbent upon him, or that it was possible for him to do in obedience to the order of the 12th of April, the delay or default of the registrar in appointing no time and place thereupon for the execution of the bond cannot be held to result in an act of bankruptcy on the part of the plaintiff; that the application was still pending and undisposed of on the 21st of April, and that the affidavit of an act of bankruptcy, the petition and the other acts done, or procured to be done by the defendant on that day, were unlawful and void.

I cannot conclude this part of the case without observing that it seems to me impossible to review these proceedings, and consider them alone as they affect the plaintiff, without wondering that it can be seriously contended that they can be authorized by the law of this country. If it be the law that the application to dismiss the debtor's summons on the 2nd of April did not stop the operation of the summons, and prevent the committing of an act of bankruptcy on the 5th, or on the 21st, it may well be said that the provisions of the 7th section, and the rules for carrying them into effect are, in the well-known words of a noble and learned judge, "a mockery, a delusion, and a snare."

Let us consider the condition of the debtor under the circumstances of this case, as they actually occurred. He is threatened with bankruptcy, and served with a debtor's summons in respect of a debt which he believes that he does not owe. He is told, and truly, that, by the Act of Parliament and the rules, if he denies the debt upon oath, and gives a bond with two sureties to pay the debt, if upon the trial of an action it is proved to be due, he may prevent or put an end to the proceedings in bankruptcy. He accordingly makes the affidavit, and applies to the Court for relief, and is told that he must give security for the debt, in case it should turn out to be due. He answers: "I'm ready to do so. I offer you security upon property of mine, in your own hands, worth three times the amount of the debt you claim." The reply is: "No. I'll not accept it unless you acknowledge the debt." He says: "I will not acknowledge the debt. What other security does the law require?" He is told, "A bond with two sureties." He says: "Be it so. When, and how, and where are I and my sureties to give this bond?" The law answers, "Look to the 162nd rule." What says that? "You must give notice to Mr. Sparrow, the solicitor of the petitioning creditor, and to the registrar of the names and places of abode of your sureties, and the registrar will appoint a time and place where you and your sureties are to appear and execute the bond." He does so. He gives the notices, and in due time; and he awaits the appointment to execute the bond; and, while thus awaiting it, he is made a bankrupt, his property is seized, his shop shut up, and his credit destroyed in a single day. He wakes in the morning of the 21st of April, and believes himself to be, and he is, a thriving and prosperous man, above the world to the extent of 5000*l.* He is guilty of no fraud, no misconduct, no default. He has done all that the law requires; all that he could do, or that could be done according to law, and he finds, before the sun sets, he is made a bankrupt; that all that he possesses in the world is seized by officers (miscalled, as he thinks, officers of justice); his dealings in the articles of his trade to which he looked for the means of daily subsistence stopped, and he returns to his bed—to sleep if he can —a ruined man.

I thought at the trial, and I think now, that if the law of this country permits and justifies an act and a proceeding like this, it is impossible to suppose that the legislature would leave that law unrepealed for a single session of parliament.

Then comes the remaining question: Had the defendant reasonable and probable cause, or did he not know or believe that he had no right or power by law, and no reasonable or probable cause to file an affidavit that an act of bankruptcy had been committed, and present a petition and procure, ex parte, the appointment of a receiver, and seize the property of the plaintiff on the 21st of April? He swore at the trial that he had studied the Act, and made himself perfectly acquainted with the rules, and especially the 162nd, to which his attention was called, in terms, by myself, and that this was true was proved by the readiness with which he took upon himself the preparation of the order of the 12th of April; the rapidity with which he followed up one act and proceeding with another; the affidavit of an act of bankruptcy, the petition, the affidavit for a receiver, the appointment of a receiver, and the seizure of the plaintiff's property and effects, all on the 21st of April, between twelve o'clock in the day and six o'clock in the afternoon. So also the promptitude with which, on the 7th of May, he brought forward a supposed report of a case to justify the seven days' clause, and quoted the 82nd section as an answer to

Mr. Cooke the moment that learned judge had decided that the objection made to the act of bankruptcy was fatal.

The act of bankruptcy which he swore to in support of the petition on the 21st of April was, that the plaintiff had failed to pay or compound for the debt at the expiration of the seven days from the service of the debtor's summons. It is impossible to believe that if he had supposed that this was really an act of bankruptcy he would have been restrained by any spirit of forbearance or indulgence towards the plaintiff from presenting his petition on the 5th of April, and proceeding as speedily as possible to an adjudication. He must have known, therefore, when he petitioned on the 21st of April, that no such act of bankruptcy had been committed, and that the application to dismiss the debtor's summons on the 2nd of April had suspended its operation—at least until it was heard and the order made on the 12th of April. Then, is it possible to suppose that he believed an act of bankruptcy to have been committed by the non-execution of the bond on the 20th? I cannot bring myself to believe that any intelligent man, with the 162nd rule before him, could imagine that the debtor, having given notice of his sureties within the time required, had committed an act of bankruptcy, because the registrar had not appointed a time and place for the execution of the bond, and so enabled him to justify his sureties and execute it. No such act of bankruptcy is among the six enumerated in s. 6, and it seems to me absurd to suppose that the petitioning creditors' solicitor and the registrar together could make it an act of bankruptcy by issuing an order which the registrar had no authority to make, and which called upon the debtor to perform an impossibility. If then he knew that the affidavit and petition were illegal, does it constitute reasonable and probable cause to him, and justify his acts that a fortnight afterwards one judge, and a month afterwards another—the one upon different grounds from those upon which the defendant had pretended to act, and which he held to be insufficient, the other upon grounds which we are unable satisfactorily to ascertain—pronounced or affirmed the adjudication.

This raises the general question at once: Is the decision of a judge, or of a Court, or of both, that an indictment will lie, or that a man may be adjudicated a bankrupt, conclusive evidence that one who had before preferred the indictment, or petitioned for the adjudication, had reasonable and probable cause for the act that he did? I maintain that it is not; and that it is evidence at all only so far as it may tend to satisfy a jury that, what the judge and the Court held to be the law, the prosecutor or the petitioner bonâ fide believed to be the law; and that the moment it is shewn, first, that it is not the law, and, next, that the prosecutor or petitioner knew or believed that it was not the law, there is no probable cause to him; and, if malice be proved, he is liable to an action. It is essential to remember that what is probable cause to one man may not be probable cause to another; and this, whether the question arises upon matters of law or matters of fact as constituting the probable cause. What is probable cause is for the judge; but the question whether the facts existed which constitute probable cause, and, in this case, whether the defendant knew or believed that the acts which he was about to do were lawful, is entirely for the jury. In a case like this, therefore, whatever may have been the decision of the judge, or of judges, afterwards, the question for a jury is whether the defendant bonâ fide believed the law to be such as authorized the act about to be done, or knew or believed the contrary.

Suppose a solicitor had been present at a decision in the House of Lords that an assignment to a creditor in a particular form did not amount to an act of bankruptcy; and a month afterwards, to gratify malice against a debtor, and thinking that he might impose upon a county court judge, he had filed a petition in bankruptcy in the county court upon an affidavit that his debtor had committed an act of bankruptcy by making an assignment which he sets forth, and which is in the exact form before mentioned, and the county court judge had held erroneously that it amounted to an act of bankruptcy, and pronounced an adjudication accordingly; would this decision, when afterwards reversed, be reasonable and probable cause to the solicitor for having presented the petition and procured the adjudication in bankruptcy?

Again, a father and son are living at home together, the father has lost his watch, and the butler informs the son that he has seen the watch hidden in the footman's box. This would seem to be ample probable cause. The son, in the absence of the father, prosecutes

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the footman, and he is convicted to the satisfaction of the judge and jury, but an acquittal is afterwards entered upon a technical point reserved. It turns out, and is proved upon the trial of an action against the son, that he himself stole the watch and hid it in the footman's box. Was the conviction probable cause to him, or is he liable to the action?

So imagine this case. A gentleman, perhaps a barrister, knows that to steal a number of rabbits under certain circumstances is no felony; but wishing to get rid of a troublesome fellow in his neighbourhood, prosecutes him before magistrates, charging such a theft as a felony, and persuades them that it is felony, and they convict him. The conviction is quashed upon some informality, so as to remove the technical impediment to an action, and he sues the gentleman, who in the mean time has talked about the matter and admitted that he knew that the law was against him, and this is proved upon the trial. Had he probable cause, or is the action maintainable? The cases of this description are various. The magistrates may have convicted upon one ground: the Court of appeal may have reversed upon another; but whatever the grounds of the different decisions, and however they may or may not amount to evidence more or less cogent, that another man, the defendant in an action, may well have believed that to be the law which a judge or a Court has held to be the law; every such case must raise the question for the jury, whether the defendant in *the* action did or did not know or believe that the act about to be done was unlawful. If the jury are satisfied that he did, and the act was unlawful, it is immaterial what number of decisions may have been pronounced to the contrary, as the jury will have found that they had no influence on his mind, and he has done that which he knew he had no lawful right to do. It may be said that it is difficult and sometimes impossible to prove this knowledge and belief in the mind of the defendant in an action; but it is enough to say that it may in some cases be conclusively and incontrovertibly proved by his own confession, and that though it be proved by other evidence, that merely varies the degree of proof upon which it is always for a jury to decide.

Heslop v. *Chapman* (1), in the Exchequer Chamber, seems to

(1) 23 L. J. (Q.B.) 49. 18 Jur 348

me to establish the proposition that, although the question of reasonable and probable cause is for the judge, the reasonable and probable cause itself must depend upon the facts, and that the judge cannot pronounce any opinion in point of law until the facts are ascertained. And it was decided in that case, that although the defendant in an action for a malicious prosecution for perjury had been told that what the plaintiff had sworn upon the trial of a cause was false, and that that information to the defendant, if true, or if he believed it to be true, would amount to reasonable and probable cause, yet that it was a question for the jury whether the defendant did believe it to be true; and that if they were satisfied that he did not, there was no reasonable and probable cause to him, and the action against him was maintainable.

I agree that in an action like this, where a Court or judge has held the wrongful act charged, or a similar act to be lawful, a verdict negativing probable cause ought not to be pronounced by a jury or accepted by a judge, or a Court of law, without great caution and much deliberation. And if I entertained any doubt that the defendant here knew that he was acting contrary to law, I should readily concur in granting a new trial. But I cannot bring myself to hold that if a man do an unlawful act to the grievous injury, or, as in this case, to the ruin of another, knowing that it is unlawful, he can justify or defend himself in an action against him for that cause, by shewing that a judge afterwards erroneously held the act to be lawful.

It has been already observed, that if the adjudication was unlawful and void, it is immaterial to consider on what grounds it was held to be valid, if the defendant knew or believed that he had no lawful right to institute or carry on the proceedings at all. But it may be as well to look to what the decisions were, by Mr. Cooke, and, as far as we can collect from the evidence, by Bacon, V.C. The act of bankruptcy set up by the defendant was the non-execution of the bond with sureties within seven days, which, as already more than once observed, was occasioned entirely by the default, if it were a default, not of the plaintiff, but of the registrar. And when the application to adjudicate came before Mr. Cooke, he distinctly held at once that it was no act of bankruptcy, and that the petition could not be sup-

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ported; so that the decision of Mr. Cooke can afford no evidence of probable cause to the defendant as to the act of bankruptcy. And all that Mr. Cooke did really hold, and upon which he pronounced the adjudication, was that upon the construction of the 82nd section, which enacts: "that no proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of the Court," an affidavit of an act of bankruptcy, and a petition in bankruptcy founded upon it, were not invalidated by reason of the fact that no act of bankruptcy at all had been committed; and that the want of an act of bankruptcy was a formal defect or an irregularity which did not invalidate the petition; and moreover, that the adjudicating a man bankrupt who had committed no act of bankruptcy, upon a petition, therefore, unsupported by any act of bankruptcy, had caused no substantial injustice to the man thus dealt with. I make no observation upon the decision, as I have failed to apprehend the process of reasoning upon which it was founded; it is enough to say that it could not well be reasonable and probable cause for an act done a fortnight or more before the 82nd section was even referred to.

We come next to the decision of Bacon, V.C. Of this we have no other account than what purports to be a shorthand note of the judgment (1), but which I cannot conceive to be a correct statement of what fell from that learned and eminent judge. It begins with a statement that an order had been made that the debtor's summons should be dismissed on the debtor's executing a bond with sureties within seven days. I need hardly observe that no such order was ever, in fact, made. It then proceeds to say that the debtor must have known that he had seven days, and only seven days to do all that was required. That is quite true, but the learned judge cannot have been informed that he had done all that was required. The remaining observations of the learned judge, if the report be correct, which I cannot think that it is, clearly shew that neither the real facts nor the rule can have been brought under his attention. It seems to me, therefore, impossible that any decision really pronounced by either Mr. Cooke or Vice-Chancellor Bacon, even if they had preceded the petition and the other proceedings by the defendant, and so had been known to him on the 21st of April, would have constituted any probable cause to him for such proceedings.

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(1) Ante, p. 330, n.

As to the judgment of Lord Justice James, that learned judge seems to have determined that the adjudication should be annulled simply and merely upon the plain and obvious ground that all proceedings on the summons were expressly stayed until after the trial of the action; and he probably gave little attention to the question whether the plaintiff had not done all that he was required to do under the order of the 12th of April, before the expiration of the seven days. (1) He certainly observes that this difficulty might perhaps have been got over, but not till after he had stated that there was great force in the argument that the debtor was not in default, because the registrar never fixed, as he ought to have done, a time and place for the execution of the bond. And he remarked, in conclusion, that it was unnecessary to decide that point.

It has been contended that, supposing the petition and the procuring the appointment of a receiver to be unlawful, that is not so as to the obtaining the adjudication, and that the jury should have been directed to distinguish between the acts done on the 21st of April, and the obtaining the adjudication on the 7th of May; and that no such distinction having been made, and the verdict and the damages given generally upon the whole matter of complaint, there must at all events be a new trial. No point of this kind was made at the trial. If it had been I should have amended the declaration, if necessary, by introducing allegations distinguishing between these two subjects of complaint, and directed the jury to find separate damages accordingly. But I think no such amendment was necessary, and no such distinction exists.

If the defendant maliciously and without reasonable and probable cause filed the affidavit and petition on the 21st of April, upon which he afterwards proceeded to the adjudication on the 7th of May, and that adjudication was afterwards annulled and the whole proceeding set aside as unlawful and void, the whole constitutes but one subject of complaint, and entitles the plaintiff

(1) Law Rep. 5 Ch. 741.

to maintain this action. It has been said that any man has a right to petition for an adjudication, and to bring his petition to a court of competent jurisdiction, provided he submits his case to the Court truly and fairly. But this was not done by the defendant. He founded his petition upon an alleged act of bankruptcy on the 5th of April, being the non-payment of the debt claimed within seven days of the service of the debtor's summons, and he claimed to support it upon an act of bankruptcy alleged to have been committed on the 21st of April, by reason of the non-execution of the bond on or before the 20th. But whatever may have been the precise form and nature of the entire proceeding or of any part of it, if the proceeding itself was originally instituted and afterwards carried on unlawfully and without reasonable and probable cause, the action lies. Where, before the abolition of arrest on mesne process, a man arrested an alleged debtor without reasonable and probable cause, and proceeded with his action to trial, and even obtained a verdict and judgment, if the judgment and the proceedings from the beginning were set aside, an action for the malicious arrest was maintainable, notwithstanding the plaintiff in the first action had proceeded to trial, and, as before supposed, had obtained a verdict and judgment. The having commenced an action with an arrest maliciously, and without probable cause, and which at last is held to be not maintainable, is sufficient to entitle the party aggrieved to maintain his action for damages.

A doubt has been suggested whether the declaration contains a substantive charge that the defendant maliciously and without probable cause procured the appointment of a receiver, and caused the property of the plaintiff to be seized; but I think that the charge as alleged is partible, and is,

1. That the defendant filed a petition.

2. Caused and procured the plaintiff to be adjudged a bankrupt, and,

3. Caused his real and personal estate, goods and effects to be seized and taken from him; and that therefore if it were necessary to sever these three complaints, either one or the other, or all are sufficiently charged.

Then, was there evidence of malice? And upon this point it may be enough to say, that as the verdict of the jury establishes that there was a want of reasonable and probable cause, that alone was evidence from which they were at liberty to infer malice. But there were also a great many facts appearing, almost throughout the trial, which support the verdict of the jury on this question. At the meeting of the 12th of April, when the defendant knew that his imperious client was determined to compel the plaintiff, if he could, to admit the debt, it was sworn that the plaintiff offered security for the debt in case it should be established, upon property in the hands of Sir R. Harvey, to three times the amount of the debt. And though the defendant denied that he had been consulted, or had influenced his client to reject this offer, there was ample evidence for the jury to find this denial untrue, and that he had advised and encouraged Sir R. Harvey to the harsh and severe course which he pursued.

It was also for the jury to consider whether, when he introduced into the order the clause requiring the plaintiff to execute the bond within seven days, he was not well aware that, if an order with a limitation of time was to be made at all, it should have been for the giving notice of the sureties within the seven days, and not for the execution of the bond. It was this unauthorized requirement, not that the notice of the sureties should be given, but that the bond should be executed by the plaintiff within that time, that afforded him the means of perplexing and misleading the registrar and the judge of the county court, when the matter came before them. But it was his extraordinary letters of the 18th and 19th of April which I think afforded the strongest evidence of an unworthy and unjustifiable feeling in the defendant in the proceedings to carry into effect the order of the 12th of April. To form a correct judgment upon these letters it is necessary to consider the position of the parties, and the stage of the proceedings at which they had arrived. The plaintiff had, as so often observed, served the notices in strict conformity to the rule, and they had been received, and he had no more to do but to await an appointment by the registrar, and then to justify his sureties and execute the bond. The defendant, on the other hand, having received the notice, was not called upon, and had no reason or occasion whatever to write to Mr. Hand at all. He had only to await the appointment to be made by the registrar; and as by

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the rule the notice of the appointment would have called upon him to give notice to the other parties that he should object to the sureties, it was at that time, after receiving the appointment, that whatever objection he might have to the sureties should have been notified to the parties, and made at the meeting to be appointed. What then was his motive for writing to Mr. Hand at all, but still more, for writing to him in the terms of the letter of the 18th. He knew that the seven days expired upon the 20th, and seeing that on the 21st he petitioned and obtained the appointment of a receiver, and caused the plaintiff's whole property to be seized between twelve o'clock in the day and six in the evening; the jury may well have asked themselves whether he did not intend, when he wrote this letter of the 18th, to execute his purpose and to take these ruinous steps against the plaintiff on the 21st. And if he did so intend, what was the course that he ought to have pursued? Common humanity would have suggested that, if he wrote at all to the plaintiff, he should have warned him that in two days more the seven days would have elapsed, and that he would be liable to be made a bankrupt. Instead of this, he writes to him a letter, silent as to the approaching lapse of the seven days and as to any proceedings to be taken on the 21st, but telling him that his sureties would be objected to; of which the natural consequence was that he would look about him for another surety, and thus thrown off his guard, allow the 20th to elapse without taking any steps to avert the ruinous proceedings of which the defendant had given him no intimation, but against which, if he had been warned, he might possibly have provided. On the other hand, he made no communication to the registrar, to whom any objection to the sureties ought to have been addressed. And might not the jury believe that this was because any intimation to that effect to the registrar would have called his attention to rule 162, and induced him immediately to make some order which would have enabled himself to make the appointment, and so prevent the proceedings of the 21st? Then we come to the strange and unfounded statement in the letter, that the registrar would not upon principle accept an attorney as surety. The registrar proved beyond all question that he had never come to any such determination, and of course had never authorized any one to say that he had; that, on the contrary, he had expressed his willingness at the meeting of the 12th to accept Mr. Hand as surety, and declared upon oath at the trial that he would have accepted him if the meeting had taken place, and he had offered himself as he had done before. What then is the real secret of this extraordinary statement? The defendant swore that he had been so told by Bullard, and Bullard confirmed him by swearing that he had made that statement. Bullard, therefore, must have stated that which was untrue, even if the defendant had written what he believed to be true; and Bullard neither gave nor attempted to give any explanation whatever of his having made this extraordinary statement. But considering with attention the whole body of the evidence at the trial concerning Mr. Bullard, that although he was an officer of the court, and ought to have acted impartially between all litigant parties, he was constantly in communication with Sir R. Harvey and the defendant; that he took upon himself the duties of the registrar; that he proposed himself as receiver, and was readily accepted by the defendant; that he aided and supported the defendant in the cruel and ruinous proceeding of the 21st, to seize the whole property and stop the trade and resources of the plaintiff, and acted throughout, even to the final annulling of the adjudication, first as receiver and afterwards as trustee of the plaintiff's estate in bankruptcy; and considering also the merciless rapidity with which all these proceedings were hurried on, one after the other, to their completion, and that throughout them all Bullard and the defendant constantly and invariably acted together, might not the jury believe that this tale about the resolution of the registrar not to accept Mr. Hand as surety was concerted between them, and that Bullard came forward as a witness at the trial to save the defendant if he could from a verdict, by taking upon himself the authorship of this story? I thought much at the trial, and have anxiously considered since, the whole of the evidence bearing upon this part of the case, and I am utterly unable to conceive any motive which could have induced the defendant, even if the statement had really been made to him by Bullard and he had believed it, to write in those terms to Hand, and to maintain a perfect silence to the registrar, unless that he might prevent Mr. Hand from suspecting the blow which was to fall upon the plaintiff on the 21st, and the registrar from remembering the provisions of the rule which required him to make the appointment. The result was, that neither he nor Mr. Hand had the smallest idea of what was impending, and that the series of proceedings which accomplished the ruin of the plaintiff took place without any possibility of opposition or opportunity of resistance. It may be as well to add in this place, that the mode in which the purposes of the defendant were effected on the 21st of April is involved in some degree of mystery. The statute and the rules require, not merely the affidavit of the act of bankruptcy, and the petition, but that before sealing the copies of the petition for service, its statements should be carefully investigated. (rule 32) By whom this was done, or whether it was done, does not appear. Then under s. 13, after the presentation of a petition, the Court may appoint a receiver, and may direct immediate possession to be taken of the property or business of the bankrupt. We have the affidavit which was used for this purpose, and which merely states that it was important that a receiver should be appointed. Why important, does not appear. By whom this affidavit was considered, and who was the real party granting the order, though it bears the signature of the registrar, again we are not told. The whole of this proceeding took place ex parte; but when we look to rule 50, we find reason to think that notice of this ought to have been given to the plaintiff so that he might have had the opportunity of shewing cause against it; the words of the rule being, that upon applications of this nature, " in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made, unless upon the consent of such person or persons duly shewn to the Court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby four clear days at least before the day named in such notice as the day when such motion is to be made." Nothing of this kind took place, and the proceedings of that day were conducted from beginning to end ex parte and unopposed, as before detailed. No point upon this was made at the trial by the learned counsel for the plaintiff; but when we are considering the question of malice, as well as the nature of the relations subsisting and the communications which took place between Bullard and the defendant, it may not be immaterial to observe the mode in which this important part of the proceeding was conducted.

It is scarcely necessary, as further evidence of malice, to advert to the harshness and severity with which these proceedings were characterized from beginning to end. I cannot think there was any want of evidence on this point, or that any intelligent jury could have pronounced any other verdict upon it. I am of opinion also, that the personal participation of the defendant, apart from and independently of Sir R. Harvey, is evidenced by the writing of the letters of the 18th and 19th of April, and by the obtaining of the order to appoint the receiver and the authority to seize the plaintiff's property on the 21st of April. There were other circumstances as to which evidence was given in the course of the trial, which appear to me to have amply justified the verdict of the jury.

Upon the grounds, then, that the defendant was perfectly aware that the application to dismiss the debtor's summons upon the 2nd of April suspended and stayed the operation of the summons and all proceedings upon it, and that the presenting the petition and the other acts done on the 21st of April and the procuring the adjudication on the 7th of May, were unauthorized and unlawful, and that the defendant knew that thay were so, I am of opinion that he had no reasonable and probable cause for instituting and carrying them on, and, the jury having found that he was actuated by malice, their verdict is well supported by the evidence, and ought not to be disturbed.

The Court being equally divided, followed the course adopted in *Cockle* v. *London and South Western Ry. Co.* (1), and the rule dropped. (2)

Attorney for plaintiff: *Lewis Hand.*

Attorneys for defendants: *Whites, Renard, & Floyd.*

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(1) Law Rep. 5 C. P. 457, at p. 472.

(2) Subsequently, to avoid any difficulty as to the appeal, Bramwell, B., withdrew his judgment, and judgment was entered in the following form: "Rule discharged; defendant Sparrow to be at liberty to appeal without giving bail; execution to be stayed till the decision of the appeal."

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May 25.

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6 CP 330-1
8 CP 495, 509
9 Ex 127
138
9 QB 409
1 Ex D. 270
276.
12 QBD 119
2 Ex D. 443.
10 App Cas
259

Statutory Duty—Water Company—Waterworks Clauses Act, 1847, *s.* 42—*Liability for not keeping Pipes charged with Water at the Statutory Pressure.*

By s. 42 of the Waterworks Clauses Act, 1847, the undertakers are to keep their pipes to which fire-plugs are fixed, constantly charged with water at a certain pressure, and are to allow all persons at all times to use the same for extinguishing fire without compensation. By s. 43, a penalty of 10*l.*, recoverable by a common informer, is imposed on the undertakers for the neglect of (amongst others) this duty.

On demurrer to a declaration, by which the plaintiff claimed damages against the defendants (a water company) for not keeping their pipes charged as required by s. 42, whereby his premises were burnt down:—

Held (following *Couch* v. *Steel* (3 E. & B. 402; 23 L. J. (Q.B.) 121),) that the declaration was good. 18 Jur 515

DECLARATION: That by 26 Vict. c. xxxiv. (incorporating the Waterworks Clauses Act, 1847), the defendants were incorporated with certain powers of taking land and supplying and maintaining waterworks; that the plaintiff was at the time, &c., the owner and occupier of a dwelling-house, timber-yard, and saw-mills, situate within the limits prescribed by the first-mentioned Act for the supply of water by the defendants, and was under the provisions of the said Act, and the Waterworks Clauses Act, 1847, entitled, for reward to be paid by him to the defendants in that behalf, to a supply of water by the defendants, and had complied with all the provisions of the said Acts in order to entitle him to such supply for domestic and other purposes; that before, &c., the defendants had laid down certain pipes near to the said dwelling-house, &c., of the plaintiff for the purpose of supplying water according to the said Acts, and had fixed to such pipes certain fire-plugs; that nevertheless the defendants, neglecting their duty in that behalf, did not at all times, and especially at the time of the breaking out on the said dwelling-house, &c., of the plaintiff of the fire thereinafter mentioned, keep charged with water their said pipes to which fire-plugs had been and were then so fixed as aforesaid, under such pressure as by the said first-mentioned Act, and the Waterworks Clauses Act, 1847, was required, although the defendants were not prevented from so doing by frost, unusual drought, or other unavoidable cause or accident, or by the doing of necessary repairs; that during the time the said pipes, with the said fire-plugs affixed thereto, were so laid as aforesaid, a fire broke out in the timber-yard and saw-mills of the plaintiff, and by reason of the defendants not having kept charged the said last-mentioned pipes under such pressure as aforesaid, a proper supply of water could not be procured for the purpose of extinguishing the said fire, and in consequence thereof the timber-yard and saw-mills were burnt down, and the plaintiff was and is greatly damaged.

Demurrer and joinder. (1)

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(1) The Newcastle and Gateshead Waterworks Act, 1863 (26 Vict. c. xxxiv.) by s. 3 incorporates the Waterworks Clauses Act, 1847 (10 Vict. c. 17.) The material sections of the latter Act are as follows:—

S. 35: "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all inhabitants of the town or district within the limits of the special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water-rate for the same; and such supply shall be constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within the said limits . . . and the undertakers shall cause pipes to be laid down and water to be brought to every part of the town or district within the limits of the special Act," on such requisition by the owners and occupiers, and upon their entering into such agreement as mentioned in the section.

By s. 36, if the undertakers refuse or neglect to lay down pipes, as mentioned in s. 35, "they shall forfeit to each of such owners and occupiers the amount of rate which he would be liable to pay under such agreement, and also the further sum of 40s. for every day during which they shall refuse or neglect to lay down such pipes, or to provide such supply of water: provided always that the undertakers shall not be liable to any penalty for not supplying water, if the want of such supply shall arise from frost, unusual drought, or other unavoidable cause or accident."

By s. 37, the undertakers are to keep constantly laid on (unless prevented by the above-mentioned causes) in all the pipes to which fire-plugs shall be fixed, a sufficient supply for certain public purposes therein mentioned (not including the extinction of fires); such supply to be provided at rates to be agreed upon by the town commissioners and the undertakers, or determined as therein mentioned.

By s. 38, "The undertakers, at the request of the town commissioners, shall fix proper fire-plugs in the main and other pipes belonging to them," in the manner mentioned in the section, "for the supply of water for extinguishing any fire which may break out within the limits of the special Act."

By s. 39, the undertakers are to keep the fire-plugs in repair, and provide keys, &c.; and by s. 40, the costs of fixing and repairing the fire-plugs,

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Holker, Q.C. (*Herschell* with him) in support of the demurrer. The plaintiff seeks to make the defendants liable upon the statutory duty imposed by s. 42 of the Waterworks Clauses Act, 1847. But the true inference from s. 43 of that Act is that the legislature having given a penalty for the breach of any of the duties enumerated in it, including the one in question, and having also given a compensation of 40*s.* a day to any person who might suffer an injury by the non-supply of water for which he would have to pay, intended by these provisions to state the whole liability of the defendants, and did not mean that compensation should be paid by them in any other case. It is obvious that this would be so with respect to the duty of laying down pipes under s. 35; the person injured by the defendants' neglect could not recover anything beyond the amount of rate he would be liable to pay, and the 40*s.* a day (s. 36). It would be the same with respect to the default mentioned in s. 43 in supplying the town commissioners or persons who had paid or tendered water-rates; they could only recover (besides the 10*l.* penalty) the 40*s.* a day provided by that section. To suppose, then, that a person injured

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providing keys, &c., are to be defrayed by the town commissioners.

By s. 41, at the request and expense of the owner or occupier of any work or manufactory, the undertakers are to place and maintain a fire-plug as near to it as may be.

By s. 42, "The undertakers shall at all times keep charged with water, under such pressure as aforesaid [see s. 35], all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same."

By s. 43: "If, except when prevented as aforesaid, the undertakers neglect or refuse to fix, maintain, or repair such fire-plugs, *or* to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid, upon such terms as shall have been agreed on or settled as aforesaid, *or if*, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid, *or* neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive (*sic*) a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of 10*l.*, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of 40s. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

by the defendants' failure to keep the pipes in connection with fire-plugs charged, could recover unlimited compensation, would be to give to those who were to pay nothing at all for the use of the water, and who might not be payers of water-rates at all, nor even inhabitants, a far larger remedy than is given to those who are entitled to the water on the terms of paying for what they get. The use of the water for extinguishing fire being gratuitous, the only remedy which the legislature has provided for a person who suffers damage from fire by reason of the pipes in connection with the fire-plugs not being kept duly charged, is the penalty of 10*l.*

[BRAMWELL, B. That penalty he could only enforce as a common informer under s. 88, not as a person aggrieved.]

Stevens v. *Jeacocke* (1) is in favour of the defendants; and *Couch* v. *Steel* (2) is not in point, because here there is a provision for compensation where compensation is intended to be given. Further, the injury is too remote.

Quain, Q.C. (*G. Bruce* and *Shield* with him), contrà, was not called upon.

KELLY, C.B. This case appears to me altogether free from doubt. The Act of Parliament imposes upon this company the general duty of providing water to meet the wants of the people of Newcastle; and among other duties there is specifically imposed upon them that of keeping the water in the pipes connected with the fire-plugs (to be placed by them in certain positions), at such a level as will enable the water to go to the top storey of the highest houses within the district. They have failed in the performance of this duty; the plaintiff brings this action for injury which he has sustained by reason of that failure, and the question is whether he can maintain it. It is contended that he cannot, because the Act imposes penalties for the non-performance of the duty. I will not go further into the authorities or the principles of law applicable to the question than to refer to the case of *Couch* v. *Steel*, where the judgment of Lord Campbell (which was the judgment of the Court), really comprises the whole law on the subject. He

(1) 11 Q. B. 731. (2) 3 E. & B. 402; 23 L. J. (Q.B.) 121. 18 Jur 515.

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says (1): "The general rule is, that 'whenever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages' (Com. Dig. Tit. Action on the Case. A.) The statute of Westm. 2, c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute: see 2nd Inst. p. 486, and in Com. Dig. Tit. Action upon Statute. F, it is laid down that 'in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.'" The second count (which was the one then in question), contained no allegation in terms of any duty on the part of the defendant to supply medicines for the use of the ship's company; but the plaintiff relied upon the obligation cast upon the defendant by the 18th section of the statute 7 & 8 Vict. c. 112, by which it is enacted that "every ship navigating between the United Kingdom and any place out of the same, shall have and keep constantly on board a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea voyages," in accordance with the scale which shall be issued by the Admiralty, and published in the *London Gazette;* "and in case any default shall be made in providing and keeping such medicines, &c.," the owner of the ship shall incur a penalty of 20*l.* for each and every default; and upon this ground judgment was given for the plaintiff. Now, substitute for the duty to supply medicines, the duty to provide a sufficient supply of water for the purposes in question in this case, and the penalty of 10*l.* for that of 20*l.*, and the cases are identical. I can find no distinction, and therefore our decision must be in accordance with the principles there laid down, which appear to me entirely free from doubt.

It has been urged that the damage is too remote; but what kind of damage can be more a proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved? On these grounds I am of opinion that the plaintiff is entitled to the judgment of the Court.

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(1) 3 E. & B. at p. 411; 23 L. J. (Q.B.) at p. 125. 18 Jan 57

MARTIN, B. I do not consider this case as by any means clear. It appears extraordinary that this company should, without express words, be made an insurance office for all Newcastle and Gateshead; but I do not dissent from the judgment of my Lord and my learned Brothers.

BRAMWELL, B. I agree with the Lord Chief Baron; I think the case is decided by the authority of *Couch* v. *Steel* (1), but it is material to say, that I should have come to the same conclusion without it. The statute has imposed upon the defendants, by s. 42, the duty of keeping their pipes, in which fire-plugs are fixed, charged with water under a certain pressure, and they are to allow all persons at all times to take and use this water for extinguishing fire without paying compensation. They have undertaken this duty, and have consented that it should be put on them, in consideration, I suppose, of the benefits they derive from the powers conferred on them by the statute. Now, when a duty is imposed on a person, it always supposes a correlative right in some one, either in the public or in the individual. When it is in the public, the remedy is usually by indictment; but when the duty is imposed for the benefit of the individual, then, unless some peculiar and specific remedy is given to him by the same statute which creates his right, it seems to follow that he has the ordinary remedy by action. Is, then, this duty created in such a way as to confer the correlative right upon the public or on the individual? It is manifest that it is created in such a way as to confer the right, not upon any section of the public, but upon the individual. The public at large are not interested in extinguishing fires in the houses of individuals, but the individual is. Therefore it seems to me to follow that, unless some compensation is given to him for the violation of his right, he is entitled to maintain an action at common law. Mr. Holker could not help admitting, that although a common informer (which, as it includes all mankind, must include the sufferer) might have recovered a penalty of 10*l.*, yet there is not in the statute any compensation given to the sufferer, whose right to the water for

(1) 3 E. & B. 402; 23 L. J. (Q.B.) 121. 10 Jan 576

the extinguishment of fire on his premises has been infringed. If so, then the ordinary right of action exists.

It has been suggested that this was not the proximate cause of damage; but to my mind clearly that is not so. The plaintiff's right is to have the pipes charged for the purpose of extinguishing fire; and he has alleged that, in consequence of these pipes not being so charged he could not extinguish the fire, and his house was burnt down. It appears to me that we have here the immediate consequence of a proximate cause.

Cleasby, B. I have come to the same conclusion, and I confess without hesitation. Under this Act of Parliament the defendants obtain great powers of taking lands, appropriating streams, &c., and are also entitled to charge certain rates for the water supplied. That is the consideration for which they are satisfied to enter into the corresponding obligation imposed upon them by the 42nd section, which provides that they shall keep their pipes charged with water at a certain pressure, "and shall allow all persons at all times to take and use such water for extinguishing fire."

It has hardly been contended that the 42nd section, taken by itself, would not give him a complete right; but it has been argued that the effect of the 43rd section is to enact by implication that no compensation shall be made, except such as is there provided. But this does not appear to me to do so; that section, which provides a penalty recoverable by a common informer, has nothing to do with compensation, but is for the purpose of prevention; if at any time—if at a time when the water was not required at all, it could be shewn that the water was not kept at the right pressure, the defendants would have been liable to that penalty. Neither that nor any other section makes any provision for compensation to a person prevented from having the benefit of the 42nd section, in whatever way that may happen; and there is, therefore, nothing in the Act to disentitle the plaintiff to maintain this action.

Judgment for the plaintiff.

Attorneys for plaintiff: *Walters & Gush, for Clarkes & Youll, Newcastle-upon-Tyne.*

Attorneys for defendants: *Williamson, Hill, & Co.*

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See Custom of Stock Exchange. 1.

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CALLS—Indemnity—Sale of shares **Ex. Ch.** 132
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CARRIER—Misdelivery - - - 36
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CASE ON APPEAL—County court - - 87
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CASES—*Couch* v. *Steele* (3 E. & B. 402; 23 L. J. (Q.B.) 121) followed - - 404
See Statutory Duty.

—— *Dunlop* v. *Higgins* (1 H. L. C. 381) commented on - - - - 108
See Letter of Allotment.

—— *Flureau* v. *Thornhill* (2 W. Bl. 1078) followed - - - - - 59
See Defect of Title.

—— *Grissell* v. *Bristowe* (Law Rep. 4 C. P. 36) followed - - - **Ex. Ch.** 132
See Custom of Stock Exchange. 1.

—— *Jackson* v. *Spittall* (Law Rep. 5 C. P. 542) followed - - - - 46
See Cause of Action.

—— *Quested* v. *Michell* (24 L. J. (Ch.) 722) commented upon - - - 291
See Rule in Shelley's Case.

—— *Ex parte Veness* (Law Rep. 10 Eq. 419) discussed - - - - 228
See Seizure under Fi. Fa. 2.

CAUSE OF ACTION—*Writ issued for Service Abroad—Common Law Procedure Act*, 1852 (15 & 16 *Vict.* c. 76), *s.* 18.] The defendant made a promise of marriage to the plaintiff whilst both parties were residing abroad. Both afterwards came to England, where the defendant wrote a letter to the plaintiff renouncing the contract. He afterwards left the country. The plaintiff, under 15 & 16 Vict. c. 76, s. 18, issued a writ indorsed for service abroad. The defendant, having been served with the writ abroad, moved to set it aside:—*Held* (by Martin, Pigott, and Cleasby, BB.; Kelly, C.B., dissenting), that the writ was rightly issued.—By Pigott and Cleasby, BB. (agreeing with *Jackson* v. *Spittall* (Law Rep. 5 C. P. 542), that *cause of action* in s. 18 means the act or omission constituting the violation of duty complained of, and not the *whole* cause of action. Durham *v.* Spence - - - - 46

—— Statutory duty - - - - 404
See Statutory Duty.

CHARTERPARTY—Agent—Commission - 9
See Commissions "inwards and outwards."

—— Freight—Payment - 20, **Ex. Ch.** 319
See Payment on account of Freight.

—— Full and complete cargo - **Ex. Ch.** 53
See Full and Complete Cargo.

"CHILD BORN OR TO BE BORN" - - 291
See Rule in Shelley's Case.

COAL DUES—Income-tax - 70, **Ex. Ch.** 808
See Income-tax.

COLLATERAL AGREEMENT—Written contract—Parol variation - - - 76
See Evidence to vary written Contract.

COLLECTION OF WATER—*Landlord and Tenant—Occupiers of Upper and Lower Floors.*] The plaintiffs hired of the defendant the ground-floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the plaintiffs' goods. The defendant had used reasonable care in examining and seeing to the security of the gutters and the box. In an action by the plaintiffs against the defendant for the damage so caused:—*Held*, that the defendant was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. Carstairs *v.* Taylor - - 217

COMMISSION—Charterparty - - 9
See Commission "inwards and outwards."

COMMISSIONS "INWARDS AND OUTWARDS"—*Charterparty — Construction — Printed and written Matter.*] A charterparty made between the plaintiffs, the charterers, through the agency of G. & Co., and the defendant, the captain of the *Elvezia*, provided among other things that the ship should proceed with a cargo to San Francisco, "where the ship shall be consigned to charterers' agents inwards and outwards, paying the usual commissions . . . and deliver the same . . . and so end the voyage;" and that "on her return to her port of discharge in the United Kingdom" she should be reported at the Custom House by G. & Co.:—*Held*, that these provisions did not impose on the defendant an obligation to accept a homeward cargo for the United Kingdom from the plaintiffs' agents at San Francisco, but merely bound him, if he had determined upon taking a return cargo on board there, to employ them to procure and ship it. Cross *v.* Pagliano - 9

COMPANY—Shares—Allotment - - 108
See Letter of Allotment.

—— Winding-up—Set-off - - - 185
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COMPANIES ACT, 1862—Sects. 87, 101, 130, 131
See Set-off. [185

COMPULSORY REFERENCE - - 224
See Matter of "Mere Account."

CONSIDERATION—Bill of sale - - 203
See Seizure under Fi. Fa.

CONSTRUCTION—Charterparty - - 9
See Commission "inwards and outwards."

—— Charterparty - - 20, Ex. Ch. 319
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—— Contract—Indemnity - - - 43
See Indemnity against Costs.

—— Will - - - - - 190
See Fee without Words of Limitation.

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CONTINGENT LIABILITY—Proof - - 312
See Proof for Contingent Liability.

CONTRACT—Indemnity - - - 43
See Indemnity against Costs.

—— Parol variation of written contract - 70
See Evidence to vary written Contract.

—— Personal skill - - - - 269
See Contract for Personal Services.

—— Sale of lease—Measure of damage - 59
See Defect of Title.

—— Sale of shares - - - Ex. Ch. 132
See Custom of Stock Exchange. 1.

—— Telegram - - - - 7
See Mistake in Telegram.

CONTRACT FOR PERSONAL SERVICES—*Conditional Contract—Contract to do an Act requiring Personal Skill—Illness—Excuse from Performance.*] The plaintiff contracted with defendant's wife (as her husband's agent), that she should play the piano at a concert to be given by the plaintiff on a specified day. She was, on the day in question, unable to perform through illness. The contract contained no express term as to what was to be done in case of her being too ill to perform. In an action against the defendant for breach of this contract:—*Held*, that his wife's illness and consequent incapacity excused him, inasmuch as the contract was in its nature not absolute, but conditional upon her being well enough to perform. Robinson *v.* Davison - - 269

COSTS—Case sent to county court - - 35
See Costs of Case sent to County Court.

—— Indemnity - - - - 43
See Indemnity against Costs.

—— Reference by consent - - - 200
See Costs under County Court Acts. 1.

—— Reference of cause and all matters in difference - - - - 213
See Costs under County Court Acts. 2.

COSTS OF CASE SENT TO COUNTY COURT—30 *& 31 Vict. c.* 142, *s.* 10—*Case sent to be tried in the County Court.*] After an action has been sent to be tried in a county court under 30 & 31 Vict. c. 142, s. 10, the court in which the action was brought has no jurisdiction over the costs, and cannot make an order to tax. Moody *v.* Steward [35

COSTS TO ABIDE THE EVENT OF REFERENCE [213
See Costs under County Court Acts. 2.

COSTS UNDER COUNTY COURT ACTS—*Reference by Consent—Discretion of Arbitrator.*] In an action of trover and of debt a verdict was taken for the plaintiff for the damages claimed, subject to a reference, "the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator." The arbitrator awarded that the verdict should be entered for 2*l.* 10*s.* as to the claim in trover, and for 7*l.* 12*s.* 8*d.* as to the claim in debt, and directed the defendant to pay the costs of the reference and award. He had the power of certifying for costs, but gave no certificate. The taxing-officer declined to tax the plaintiff either his costs of the cause, or of the reference and award. On a rule directing him to tax both the costs of the cause and of the reference and award:—*Held*, that the plaintiff was not entitled to the costs of the cause, but that he was entitled to those of the reference and award, although he had recovered in the cause sums not exceeding 10*l.* in tort, and 20*l.* in contract. Forshaw *v.* De Wette [200

2.—— *Cause and all Matters in Difference referred—Costs of Cause to abide "Event of Reference"—County Courts Act,* 1867, *s.* 5.] A cause and all matters in difference were referred, and it was ordered that "the costs of the cause should abide the event of the reference, and that the costs of the reference and award should be in the discretion of the arbitrator." As to the cause, the arbitrator awarded a verdict for the plaintiff for 259*l.* 1*s.*; as to the other matters in difference, he found that 242*l.* 13*s.* 10*d.* was due to the defendant from the plaintiff, and directed that this sum should be deducted from the damages and costs recoverable in the action, and that the defendant should pay the plaintiff the balance:—*Held*, that although the arbitrator had decided something in favour of each party, and although the difference between the two sums awarded did not exceed 20*l.*, the "event of the reference" was such as to entitle the plaintiff to his costs of the cause, and he was not deprived of them by the County Courts Act, 1867, s. 5. Stevens *v.* Chapman - - 213

COUNTY COURT, CASE SENT TO - - 35
See Cost of Cases sent to County Court.

COUNTY COURT APPEAL—*Rule calling upon County Court Judge to amend Case—Malicious Prosecution—Reasonable and Probable Cause.*] On the hearing of an action for malicious prosecution in the county court to which it was remitted (under 30 & 31 Vict. c. 142, s. 10), the judge who tried the cause ruled that there was an absence of reasonable and probable cause. The defendant appealed. The judge stated a case, in which he gave what he stated to be the *result* of the evi-

COUNTY COURT APPEAL—*continued.*
dence, but did not set out the evidence in detail nor insert the depositions before the police magistrate, which were put in evidence at the hearing. On an application by the defendant:—*Held*, that the judge must amend the case by setting out the depositions and the other evidence material to the question of reasonable and probable cause. Thornewell *v.* Wigner - - - 87

COUNTY COURT JURISDICTION—*Interpleader Summons under* 30 *&* 31 *Vict. c.* 142, *s.* 31—*High Bailiff of County Court—Stay of Action*] Where an interpleader summons has been issued under s. 31 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), the county court judge has power to adjudicate upon any special damages to which the claimant of the goods seized may be entitled arising out of the execution; and whether such damages are claimed before him or not, no action in respect of them can be maintained by the claimant. Death *v.* Harrison - - 15

COURSE OF BUSINESS—Carrier - - 36
See Misdelivery by Carrier.

COVENANT TO REPAIR—*Landlord and Tenant—Lease—Notice of want of Repair.*] Upon a covenant by the lessor to keep in repair the main walls, main timbers, and roofs of the demised premises, the lessor cannot be sued for non-repair, unless he has received notice of want of repair:—So *held*, by Bramwell and Channell, BB.; Martin, B., dissenting. Makin *v.* Watkinson - - 25

COVERTURE—Disability - - - 129
See Disability.

CREDITORS' DEED—Lease - - - 32
See Assignment of Lease.

CUSTOM OF STOCK EXCHANGE—*Sale of Shares—Usage of Stock Exchange—Ultimate Buyers—Ticket—Principal and Agent.*] The plaintiff having through his brokers on the Stock Exchange sold to the defendant, a jobber, ten shares in Overend, Gurney, & Co., Limited, the defendant on the "name day" passed a ticket to the plaintiff's brokers containing the name of G. as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to G. of the ten shares. It was afterwards discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., and had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, and according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers, as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares which the plaintiff was compelled to pay, and which he was unable to recover from G., he brought this action to recover them from the defendant:—*Held*, affirming the judgment of the Court below (Lush, J., dissenting), that the action was not maintainable.—By Keating, Mellor, Montague Smith, and Brett, JJ., that the defendant had fulfilled his obligation by passing a name to which no objection was taken within the time limited by the usage, and that in the absence of any fraud on his part, he could not be treated as ultimate buyer himself, or be made liable for the calls.—By Blackburn, J.:—1. That under a contract for the sale of shares, apart from Stock Exchange usages, the seller cannot require the buyer to take a transfer into his own name; but that he has a right to be indemnified by the buyer against future calls, which is not affected by his transfer of the shares to the buyer's nominee.—2. That in a contract for the sale of shares made on the Stock Exchange "for the account," all the parties to it who are members of the Stock Exchange contract amongst themselves as principals, and there is no difference between a member who is a jobber and one who is not.—3. That according to the usage of the Stock Exchange, as proved in this case, upon a sale on the Stock Exchange "for the account," fifteen days is the extreme time within which the member holding or issuing the name-ticket, as the case may be, is to declare any failure on the part of the issuer of the ticket to accept and pay for the shares, or on the part of the holder of the ticket to deliver them; and the omission to do so has the effect of preventing him from coming on the intermediate parties who have passed the ticket for such default.—When the transfers have been delivered to the issuing member, and the price is fully paid to the holder, there is a novation, which frees the member who merely passed the ticket from further liability. If either, or both, of those members were agents for others, the principals, though undisclosed, may sue and are liable to be sued to the same extent as their agents, and no more.—The novation is between the holder of the ticket or his principal and the issuer of the ticket or his principal.—4. That, in the present case, the defendant completely fulfilled his contract by delivering on the name day a ticket really issued by a member of the Stock Exchange, and was not responsible for any mistake or misconduct on the part of the issuers of the ticket, not having been applied to within the time limited for that purpose by the rules of the Stock Exchange.—By Cockburn, C.J., that G. was the ultimate purchaser of the shares within the meaning of that term as applied in the usage of the Stock Exchange, and was so treated by the plaintiff, and that the defendant was therefore free from liability according to the decision in *Grissell* v. *Bristowe* (Law Rep. 4 C. P. 36).—By Lush, J., that G. not being the real buyer of the shares, the defendant, by passing G.'s name as ultimate purchaser, had not fulfilled his contract with the plaintiff, whom he was therefore liable to indemnify against calls. Maxted *v.* Paine. (Second Action) - - - - **Ex. Ch.** 132

2. —— *Principal and Agent.*] *Principal's Liability to Broker for Broker's Default.*] The plaintiffs, brokers on the London Stock Exchange, were instructed by the defendant, who was not a member of the house, to buy certain shares in various public undertakings for him for the account of the 15th of July, 1870. Subsequently he told the plaintiffs to carry over the shares to the account of the 29th of July. This was done, and the defendant was furnished with an account shew-

CUSTOM OF STOCK EXCHANGE—*continued,* ing him to be liable to a difference of 1688*l.* 19*s.* On the 18th of July the plaintiffs were declared defaulters, and, in accordance with the rules of the Stock Exchange, all their transactions were closed, and accounts made up at the prices current on that day, without the knowledge of or any reference to the defendant. The result was that there was a difference against the defendant of 6013*l.* 13*s.* 5*d.* In an action to recover this sum :—*Held*, that the rules of the Stock Exchange, regulating the mode of dealing with defaulters, bound the defendant; that the plaintiffs, though themselves the defaulters, might take advantage of those rules, and that therefore they were entitled to recover. Duncan *v.* Hill - 255

DAMAGES—Execution—County court - 15
See County Court Jurisdiction.

DEBT—Payment by stranger - - 124
See Discharge of Debtor.

DEFECT OF TITLE—*Vendor and Purchaser—Sale of Residue of a Lease—Equitable Interest in Agreement for Lease—Measure of Damages for Breach of Contract by Vendor.*] The executors of H. having an agreement for a twenty-one years' lease of an iron ore royalty, contracted to assign their interest in the term to the defendants. In order to perfect the assignment, the consent in writing of the lessors was, under the terms of the agreement, necessary. The lessors were at the time of the contract willing to consent conditionally on the defendants signing a duplicate form of consent, whereby it was provided that no further assignment should take place without a fresh consent. Before the defendants had fulfilled this condition, and without the consent of the lessors to the assignment to the defendants having been obtained, and without any fresh consent from them to another assignment of the term, the defendants contracted to assign their interest in the royalty to the plaintiffs. At the time of their entering into this contract they knew that the consent of the lessors to the assignment to third parties was necessary, but no mention of the necessity of such consent was then made to the plaintiffs. The defendants afterwards fulfilled the condition upon which the lessors had originally been willing to consent to the assignment to them, but the lessors had meanwhile withdrawn their consent, and although the defendants used all reasonable means they failed to obtain the lessors' consent either to the assignment from the executors of H. to them or to the assignment from them to the plaintiffs. They were, therefore, unable to carry out their contract with the plaintiffs, who brought this action to recover the deposit money which they had actually paid, the expenses incidental to the investigation of the defendants' title, and also damages for the loss of their bargain :—*Held*, that the case was within the principle of *Flureau* v. *Thornhill* (2 W. Bl. 1078), and that the plaintiffs were only entitled to recover their deposit money and the expenses incidental to the investigation of the defendants' title. Bain *v.* Fothergill - - - - - - 59

DEFECTIVE MACHINERY—Negligence - 73
See Evidence of Negligence. 1.

DISABILITY—*Prescription Acts* (3 & 4 *Wm.* 4, *c.* 27), *s.* 16—*Successive Disabilities without Break—Infancy—Coverture.*] When the person to whom the right to bring an action for the recovery of land accrues is under a disability, and before the removal of that disability the same person falls under another disability, s. 16 of 3 & 4 Wm. 4, c. 27, preserves his right to bring an action until ten years after the removal of the latter disability.—In 1833, the plaintiff became entitled to land, which the defendant then entered into possession of, and continued to occupy until action brought. At the time when the plaintiff's title accrued she was an infant; she married under age, and continued under coverture until the time of bringing this action in 1870. In an action by herself and her husband in her right to recover the land :—*Held*, that the action was maintainable, notwithstanding that more than twenty years had elapsed since the title accrued, and more than ten years since the removal of the disability of infancy. Borrows *v.* Ellison - - - - 129

DISCHARGE OF DEBTOR—*Payment by Stranger—Ratification.*] The defendant being indebted to the plaintiff, S., who had acted as his attorney in the matter of the plaintiff's claim (the amount of which was disputed) but whose authority had been countermanded, paid to the plaintiff 60*l.* in discharge of the disputed claim. The plaintiff afterwards, at the request of S., and before any ratification by the defendant, repaid to S. the 60*l.*, and sued the defendant for the debt. The defendant pleaded as to 60*l.* payment, and relied upon the payment made by S. :—*Held*, that it was competent to the plaintiff and S., before ratification by the defendant, to cancel what they had done, and that the plea of payment was therefore not proved. Walter *v.* James - - - - 124

DISCRETION OF ARBITRATOR—Costs - 200
See Costs under County Court Acts. 1.

DUTY—Exemption - - - - 193
See Stamps. 1.

EQUITABLE INTEREST—Sale—Title - 59
See Defect of Title.

"EVENT OF REFERENCE" - - 213
See Costs under County Court Acts. 2.

EVIDENCE—County court appeal - 87
See County Court Appeal.

—— Written contract—Parol variation - 70
See Evidence to vary written Contract.

EVIDENCE OF NEGLIGENCE—*Pleading—Liability of Master to Servant—Defective Machinery—Servant's ignorance of Defect.*] Declaration by the administratrix of G. W. that the defendants were owners of a factory and machine, and G. W. was employed by them to work therein, and in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of the defendants it was unsafely constructed and in a defective condition, and was, by reason of not being sufficiently guarded, unfit to be used and entered, as the defendants well knew; and by reason of the premises, and also by reason, as the defendants well knew, of no sufficient apparatus having been provided by them to protect G. W., it was suddenly put in motion whilst he was at work in the machine, and he

EVIDENCE OF NEGLIGENCE—*continued.*
thereby sustained injuries from which he afterwards died. On demurrer:—*Held,* that the declaration sufficiently shewed that the machine was set in motion by the defendants' negligence, and that it therefore disclosed a cause of action, although there was no allegation that G. W. was ignorant of the dangerous and defective character of the machine.—*Semble,* per Martin, B. The defendants would, under the circumstances alleged, be liable, even if the machine had been set in motion by a stranger. Watling *v.* Oastler. 73

2. —— *Negligence — Licensee — Invitation—Customer.*] At the defendants' station at C. it was the practice to unload coal waggons by shunting them, and tipping the coal into cells; it was also the practice for the consignees of the coal or their servants to assist in the unloading, and for that purpose to go along a flagged path by the side of the waggons. The plaintiff was consignee of a coal waggon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the stationmaster, he went to his waggon, which was shunted in the usual place, took some coal from the top of the waggon, and descended on to the flagged path. The flag he stepped on gave way, and he fell into one of the cells, and was injured:—*Held* (affirming the judgment of the Court below), that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged with the consent of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition. Holmes *v.* North Eastern Ry. Co. **Ex. Ch.** 123

EVIDENCE TO VARY WRITTEN CONTRACT—*Evidence—Written Agreement—Parol Variation—Collateral Agreement.*] The respondent agreed to hire of the appellant certain grass land on the terms of a lease which was to be signed at some future time. The respondent, having entered on the land, found it was overrun with rabbits, and, on the lease being presented to him for signature, declined to sign it unless the appellant would promise to destroy the rabbits. The appellant refused to put a term in the lease binding him to do so, but agreed by parol that he would destroy them. The respondent thereupon signed the lease, which provided, among other things, that the tenant should not shoot, hunt, or sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow the landlord or friends at any time to hunt, shoot, or sport on the land. Afterwards, the rabbits not having been destroyed by the appellant, the respondent sued him in the county court for the damage done by them to the grass and crops on the land demised. The judge on the trial admitted evidence of the parol agreement, and asked the jury to say whether it had been made, and whether the lease had been signed on the faith of it. They found for the respondent on both points. Upon appeal on the ground of misreception of evidence:—*Held,* that the parol agreement was collateral to the written lease, and that the evidence was properly admitted. Morgan *v.* Griffith - 70

EXECUTION—Bankruptcy—Priority - 228
See Seizure under Fi. Fa. 2.

EXECUTION—*continued.*
—— Fi. fa.—Seizure. 1. - - - 203
See Seizure under Fi. Fa.

EXEMPTION FROM DUTY - - - 193
See Stamps.

EXTRA COSTS—Indemnity - - - 43
See Indemnity against Costs.

FEE WITHOUT WORDS OF LIMITATION—*Will before* 1838.] By a will dated before 1838, the testator gave lands to his wife without words of limitation. He also made her executrix and general legatee; and directed that "my executrix shall pay my eldest son W. P. the sum of 5*l.* a year for wages as long as he shall continue to labour on the farm after my decease":—*Held,* that the wife took the fee. Pickwell *v.* Spencer. [190

FI. FA.—Seizure - - - - 203
See Seizure under Fi. Fa. 1.

—— Seizure—Bankruptcy—Priority - 228
See Seizure under Fi. Fa. 2.

FICTITIOUS ORDER—Delivery—Carrier - 36
See Misdelivery by Carrier.

FORGERY—Ratification - - - 89
See Ratification of Forgery.

FRAUD—Compulsory reference - - 224
See Matter of "Mere Account."

FREIGHT—Payment on account 20, **Ex. Ch.** 319
See Payment on account of Freight.

FULL AND COMPLETE CARGO—*Charterparty—"Baltic" printed Rates—Cargo of "Oats or other lawful Merchandise."*] By a charterparty the defendant, the charterer, undertook to load at Archangel "a full and complete cargo of oats or other lawful merchandise," and the plaintiffs, the shipowners, to deliver the same on being paid freight as follows: "4*s.* 6*d.* sterling per 320 lbs. weight delivered for oats; and if any other cargo be shipped, in full and fair proportion thereto, according to the London Baltic printed rates."—The defendant put on board at Archangel a full and complete cargo of flax, tow, and codilla, being three of the articles mentioned in the Baltic printed rates, and paid to the plaintiffs the freight earned by the goods thus shipped according to a scale derived from the tables which constitute the Baltic rates. The plaintiffs claimed in addition, the difference between this amount and the larger amount which would have been earned by a full and complete cargo of oats:—*Held* (affirming the judgment of the Court below), that flax, tow, and codilla being "lawful merchandise" within the meaning of the charterparty, the defendant had fulfilled his contract by unloading a full and complete cargo of those articles, and, therefore, was not, on the true construction of the charterparty, liable for the additional freight claimed by the plaintiffs as upon a full cargo of oats. The Southampton Steam Colliery Company *v.* Clark. **Ex. Ch.** 53

HEIRS AND ASSIGNS - - - 291
See Rule in Shelley's Case.

HIGH BAILIFF—Interpleader - - 15
See County Court Jurisdiction.

ILLNESS—Excuse for non-performance of contract - - - - 269
See Contract for Personal Services.

INCOME-TAX—*Liability of Local Coal Dues—Rate or Duty—5 & 6 Vict. c.* 35, *Scheds.* (*A*), (*D*).] By 13 Geo. 3, c. 34, a power was given to Improvement Commissioners for Brighton, to levy a duty of 6*d.* on every chaldron of coal landed on the beach or brought into the town, for the purpose of erecting and maintaining groyns, &c., against the sea. By subsequent Acts the duty was continued and increased, and by 6 Geo. 4, c. clxxix. it was, together with rates which the commissioners were empowered to levy, market tolls, &c., to form a common fund for the general purposes of the Act, which included paving, lighting, and watching, and the maintenance of groyns and other sea works:—*Held*, that the corporation (who had succeeded to the rights of the commissioners) were liable to pay income-tax in respect of the coal duty. Attorney-General *v.* Black - - 78

2. —— *Liability of Local Coal Dues—Rate or Duty—5 & 6 Vict. c.* 35—*Scheds.* (*A*) *and* (*D*)] By 13 Geo. 3, c. 34, a power was given to Improvement Commissioners for Brighton to levy a duty of 6*d.* on every chauldron of coals landed on the beach or brought into the town, for the purpose of erecting and maintaining groyns, &c., against the sea. By subsequent Acts the duty was continued and increased, and by 6 Geo. 4, c. clxxix. it was, together with rates which the commissioners were empowered to levy, market tolls, &c., to form a common fund for the general purposes of the Act, which included paving, lighting, and watching, and the maintenance of groyns and other sea works:—*Held* (affirming the judgment of the Court below), that the corporation (who had succeeded to the rights of the commissioners) were liable to pay income-tax in respect of the coal duty. Attorney-General *v.* Black - - - **Ex. Ch.** 308

INDEMNITY—Costs - - - - - 43
See Indemnity against Costs.

INDEMNITY AGAINST COSTS—*Contract of Indemnity—Taxed Costs—Extra Costs.*] In an action by a lessee against the assignee of the lease for breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in the lease, the plaintiff sought to recover, among other heads of damage, the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney incurred in unsuccessfully defending an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment:—*Held*, that the lessee was entitled to recover both the extra costs paid by him to his attorney and the taxed costs. Howard *v.* Lovegrove - - - - - - 43

INFANCY—Disability - - - 129
See Disability.

INJUNCTION—Admiralty Court - - 4
See Order of Admiralty Court.

INTERPLEADER—County court - - 15
See County Court Jurisdiction.

INVITATION—Railway company **Ex. Ch.** 123
See Evidence of Negligence. 2.

JUDGE, PROVINCE OF - - - 89
See Ratification of Forgery.

JURISDICTION—Costs - - - - 35
See Costs of Case sent to County Court.

JURY, PROVINCE OF - - - 89
See Ratification of Forgery.

LAND, MONEY TO BE LAID OUT IN—Legacy duty - - - - 286
See Legacy Duty.

LAND—Negligent user - - **Ex. Ch.** 123
See Evidence of Negligence. 2.

LANDLORD AND TENANT — Collection of water - - - - 217
See Collection of Water.

—— Covenant to repair - - - - 25
See Covenant to Repair.

LEASE—Assignment - - - 32
See Assignment of Lease.

LEASE, SALE OF—Defect of title—Measure of damage - - - - 59
See Defect of Title.

LEGACY DUTY—36 *Geo.* 3, *c.* 52, *s.* 19—*Money to be laid out in Land—Unconverted Fund falling into Possession.*] A testator, who died in 1800, by his will, bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C. (his eldest son) for life, remainder to C.'s first and other sons in tail male, remainder to J. (his second son) for life, remainder to J.'s first and other sons in tail male; remainder to his own right heirs. C. and J. died without issue and intestate, and S., the testator's only daughter, became entitled to the fund, being heir-at-law of the testator, as well as of C. and J. She died intestate, and at her death the fund, which had never been invested in land, passed to E., who was grandnephew of the testator, and heir-at-law of the testator and of C., J., and S.:—*Held*, that under s. 19 of 36 Geo. 3, c. 52, duty was payable by E. at 5 per cent. as on a bequest from S. De Lancey *v.* The Queen - 286

LETTER OF ALLOTMENT—*Company—Allotment of Shares.*] The defendant applied for shares in the plaintiff's company; shares were allotted to him, and a letter of allotment was posted to his address, but was never received by him:—*Held*, that the defendant was not a shareholder. *Dunlop* v. *Higgins* (1 H. L. C. 381) commented on. The British and American Telegraph Company, *v.* Colson - - - - - 108

LETTER POSTED BUT NOT RECEIVED - 108
See Letter of Allotment.

LICENSEE—Railway company - **Ex. Ch.** 123
See Evidence of Negligence. 2.

LIMITATION, WORDS OF—Fee without - 190
See Fee without Words of Limitation.

LOCAL COAL DUES—Income-tax 78, **Ex. Ch.** 308
See Income-tax.

MACHINERY, DEFECTIVE—Negligence - 73
See Evidence of Negligence. 1.

MALICE—Bankruptcy—Adjudication - 329
See Maliciously procuring Adjudication.

MALICIOUS PROSECUTION—Appeal - 87
See County Court Appeal.

MALICIOUSLY PROCURING ADJUDICATION—*Bankruptcy—Reasonable and probable Cause—Debtor's Summons—Act of Bankruptcy—Stay of Proceedings—Bankruptcy Act*, 1869, *s.* 6, *subs.* 5, *s.* 7.] A debtor's summons, issuing out of a county court, having been served on the plaintiff, a trader, on the 28th of March, on the 2nd of April an application was made by him to dismiss it, and on the 12th an order was made that a bond with sureties should be executed by the plaintiff, within seven days of service of the order, and an action brought to try the debt; the order also contained a stay of proceedings. The order was served on the 13th, and notice of securities was given on the 18th; but no appointment was made by the registrar, and the bond was not executed. The seven days having expired on the 20th, the creditor on the 21st presented a petition in bankruptcy, stating as the act of bankruptcy the failure of the defendant within seven days after the service of the debtor's summons to pay, secure, or compound for the debt; and on the same day he obtained ex parte the appointment of a receiver. The plaintiff was afterwards adjudicated bankrupt; the adjudication was confirmed on appeal by the Chief Judge in Bankruptcy, but was afterwards annulled by the Lord Justice, on the ground that the stay of proceedings in the order of the 12th of April was absolute, and not limited to the seven days given for the execution of the bond.—Throughout the proceedings the defendant acted as the attorney of the creditor, and the order of the 12th of April, including the insertion of the limit of the seven days, was drawn up by him.—In an action for maliciously, and without reasonable and probable cause, procuring the plaintiff to be adjudicated bankrupt, the jury found that the defendant acted personally and of his own accord in carrying on the proceedings; that he was actuated by malice; and that he knew, when he filed the petition in bankruptcy, that the proceedings in bankruptcy were stayed until an appointment had been made by the registrar for the examination of sureties and execution of the bond; and the verdict was entered for the plaintiff. On the argument of a rule to enter the verdict for the defendant, or for a new trial:—*Held*, by Kelly, C.B., and Cleasby, B., that, an application to dismiss the debtor's summons having been made and a stay of proceedings ordered, no act of bankruptcy was committed by the plaintiff in not paying, securing or compounding for the alleged debt within seven days from the service of the summons; that the allegation of an act of bankruptcy being in fact untrue, and being (as they inferred from the evidence) either known by the defendant to be untrue, or at any rate not bonâ fide believed by him to be true, he was liable in this action; and that the error of the Court in making the adjudication did not discharge him from liability, but was only evidence from which (if the fact had been doubtful) it might have been inferred that he had reasonable and probable cause for thinking that the statement was correct.—By Martin and Bramwell, BB., that under subs. 6 of s. 6 of the Bankruptcy Act, 1869, an act of bankruptcy was committed at the expiration of the seven days from the service of the summons, the plaintiff not having paid, secured, or compounded for the debt; and that, at any rate, having regard to the decisions of the county court judge and the chief judge, and their own opinion that an act of bankruptcy had been committed, there was no evidence of want of reasonable and probable cause for presenting the petition.—By Martin, B., quære, whether under the present bankruptcy law, as regulated by the Bankruptcy Act, 1869, any action can be maintained for procuring an adjudication of bankruptcy.—By Bramwell, B., no action is maintainable where the want of reasonable and probable cause is only error in point of law; and—*Quære*, whether, although no adjudication ought to have been made pending the stay, the creditor had not a right to present a petition. Johnson *v.* Emerson and Sparrow [329

MASTER AND SERVANT—Defective machinery
See Evidence of Negligence. 1. [73

MATTER OF "MERE ACCOUNT"—*Compulsory Reference—Suggestion of Fraud—Common Law Procedure Act*, 1854, *s.* 3.] The plaintiffs sued the defendant for 7,129,300 cubic feet of gas sold and delivered, during a period of nearly five years, at a price of 2*s.* 5*d.* per cubic foot. The defendant, as to part of the claim, paid money into court, and pleaded, as to the residue, "never indebted" and payment. He then obtained an order, under the Common Law Procedure Act, 1854, s. 3, compulsorily referring the action, on the ground that the matter in dispute was wholly or in part one of "mere account," which could not conveniently be tried by a jury. The plaintiffs applied to rescind this order, alleging that they proposed at the trial to attempt to prove that the defendant had been guilty of fraudulent conduct by the secret abstraction of their gas, and that upon this question, which would regulate the damages awarded, they were entitled to the verdict of a jury:—*Held* (by Channell and Pigott, BB., Kelly, C.B., dissenting), that the nature of the dispute was not altered because the plaintiffs imputed fraud to the defendant in relation to it; that, substantially, the matter was one wholly or in part of mere account, which could not be conveniently tried by a jury, and that therefore the order was rightly made. The Birmingham and Staffordshire Gas Company *v.* Ratcliff - - - - - 224

MEASURE OF DAMAGE — Contract for sale of lease—Defect of title - - 59
See Defect of Title.

"MERE ACCOUNT" - - - - 224
See Matter of "Mere Account."

MISDELIVERY BY CARRIER—*Fictitious Order.*] The plaintiffs being imposed upon by a fictitious order sent by H., a person employed by them to obtain orders, forwarded goods by the defendants, who were carriers between Liverpool and Glasgow, addressed to C. Tait & Co., 71, George Street, Glasgow, that being the name and address given them by H. In fact, there was no such firm as C. Tait & Co., but H. had made arrangements at 71, George Street, for receiving letters, &c., addressed there under that name. On the arrival of the goods at Glasgow, the defendants, following the course of business usual with carriers between

MISDELIVERY BY CARRIER—*continued.* Liverpool and Glasgow, sent a notice to the address appearing on the goods, requesting their removal, and stating that the notice must be produced, indorsed as a delivery order. This notice was received by H., who indorsed it "C. Tait & Co.," and upon presenting it so indorsed, obtained delivery of the goods. In an action against the defendants, as carriers, for misdelivery:—*Held*, that the defendants, having followed the usual course of business, which must be read as part of the plaintiffs' directions, had obeyed the plaintiffs' directions, and were not liable. M'Kean *v.* M'Ivor [36

MISTAKE IN TELEGRAM—*Principal and Agent—Telegraph Clerk.*] The defendant wrote a message for transmission by telegraph to the plaintiffs, ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three;" and the plaintiffs thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. The defendant declined to take more than three. In an action against him to recover the price of the fifty rifles:—*Held*, that the defendant was not responsible for the mistake of the telegraph clerk, and that therefore the plaintiffs were not entitled to recover the price of more than three rifles. Henkel *v.* Pape 7

MISTAKE OF FACT—Payment (Ex. Ch.) 243
See Voluntary Payment.

MONEY TO BE LAID OUT IN LAND—Legacy duty - - - - - - 286
See Legacy Duty.

MUTUAL DEALINGS—Bankruptcy - 279
See Annulling Bankruptcy.

NEGLIGENCE—Defective machinery - 73
See Evidence of Negligence. 1.

—— Railway company - - Ex Ch. 123
See Evidence of Negligence. 2.

NOTICE—Repair - - - - - 25
See Covenant to Repair.

NOTICE OF WRIT DELIVERED TO SHERIFF
See Seizure under Fi. Fa. 1. [203

"OATS OR OTHER LAWFUL MERCHANDISE" [Ex. Ch. 53
See Full and Complete Cargo.

"OCCUPATION"—Bill of sale - - 1
See Apparent Possession.

OCCUPIERS OF UPPER AND LOWER FLOORS—Water - - - - - 217
See Collection of Water.

ORDER OF ADMIRALTY COURT—*Practice—Staying Proceedings—Superior Court of Law or Equity—Injunction—C. L. P. Act*, 1852, *s.* 226.] The 17 & 18 Vict. c. 104, s. 514, enables the Court of Chancery, in cases where any liability has been, or is alleged to have been, incurred by the owner of a ship in respect of (inter alia) damage to, or loss of goods, and several claims are made or apprehended with regard to such liability, to entertain proceedings at the owner's suit to determine and distribute among the various claimants the amount of such liability *with power to stop all actions or suits* in relation to the same subject matter. The 24 Vict. c. 10, s. 13, confers a similar power on the Court of Admiralty. That Court acting under the last-mentioned statute, made an order in certain Admiralty proceedings, at the instance of the defendants, stopping the present action, which was brought against them to recover damages for loss of the plaintiffs' goods in consequence of the sinking of a ship belonging to the defendants. The defendants thereupon applied to this Court for a rule to stay, but the Court declined to interfere, being of opinion that the Common Law Procedure Act, 1852, s. 226, was not applicable to any case except where an order stopping an action or suit had been issued by a "superior court of law or equity," and seeing no reason to exercise their discretionary power at common law of staying proceedings. Milburn *v.* The London and South Western Railway Company - 4

ORDER FOR DELIVERY—Carrier - - 36
See Misdelivery of Carrier.

PAROL EVIDENCE—Variation of written contract [70
See Evidence to vary Written Contract.

PARTITION OF SHARES—Stamps - - 101
See Stamps. 2.

PARTNER—Authority—Payment - Ex. Ch. 243
See Voluntary Payment.

PAYMENT—Freight - - 20, Ex. Ch. 319
See Payment on Account of Freight.

—— Mistake of fact - - - Ex. Ch. 243
See Voluntary Payment.

—— Stranger - - - - - 124
See Discharge of Debtor.

PAYMENT ON ACCOUNT OF FREIGHT—*Ship and Shipping—Charterparty.*] The plaintiff chartered a vessel to the defendants for a homeward voyage from Calcutta, with an option to the defendants to send the vessel on an intermediate voyage at a freight therein mentioned, "such freight to be paid as follows:—1200*l.* in rupees to be advanced the master by the freighters' agents at Calcutta against his receipt, and to be deducted, together with 1¼ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge in cash as customary." By another clause the master was to "sign bills of lading at any current rate of freight required without prejudice to the charterparty; but not under chartered rates, except the difference is paid in cash." The defendants elected to send the vessel on the intermediate voyage, and paid the 1200*l.*, but induced the master, whom they required to sign bills of lading at a rate below the chartered rate, to postpone payment of the difference till the cargo was complete; the difference amounting to a less sum than 1200*l.*, they then claimed to have satisfied their obligation by the 1200*l.* already paid, and refused further payment. The vessel was lost on her way out to sea. In an action for the difference:—*Held*, that the plaintiff was entitled to the 1200*l.*, and also to the difference. Byrne *v.* Schiller - 20

PAYMENT ON ACCOUNT OF FREIGHT—*cont.*

2. —— *Ship and Shipping — Charterparty.*] Payments made in advance on account of freight cannot be recovered back, although the vessel is lost. The plaintiff chartered a vessel to the defendants for a homeward voyage from Calcutta, with an option to the defendants to send the vessel on an intermediate voyage at a freight therein mentioned: "such freight to be paid as follows:—1200*l.* in rupees to be advanced the master by the freighters' agents at Calcutta against his receipt, and to be deducted, together with 1¼ per cent. commission on the amount advanced and cost of insurance from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge, in cash as customary." By another clause the master was to "sign bills of lading at any current rate of freight required, without prejudice to the charterparty; but not under chartered rates, except the difference be paid in cash." The defendants elected to send the vessel on the intermediate voyage and paid the 1200*l.*, but induced the master, whom they required to sign bills of lading below the chartered rates, to postpone payment of the difference till the cargo was complete. The difference was not paid, and the vessel was lost on her way out to sea. In an action for the difference:—*Held* (affirming the judgment of the Court below), that the plaintiff was entitled to recover. Byrne *v.* Schiller - - - - Ex. Ch. 319

PERSONA DESIGNATA—Will - - 291
See Rule in Shelley's Case.

PERSONAL SKILL—Contract - - 269
See Contract for Personal Services.

PLEADING—Negligence - - - 73
See Evidence of Negligence. 1.

PRACTICE (COMMON LAW)—Compulsory reference - - - - - 224
See Matter of "Mere Account."

—— —— Costs - - - - 35
See Costs of Case sent to County Court.

—— —— County court appeal - - 87
See County Court Appeal.

—— —— Staying proceedings - - 15
See County Court Jurisdiction.

—— —— Writ for service abroad - - 46
See Cause of Action.

PRESCRIPTION—Disability - - - 129
See Disability.

PROMISSORY NOTE—Forgery—Ratification 89
See Ratification of Forgery.

PROOF—Bankruptcy—Contingent liability 312
See Proof for Contingent Liability.

PROOF FOR CONTINGENT LIABILITY—*Bankruptcy Act,* 1849, *ss.* 177, 178.] A bond for 1000*l.* was executed by the defendant to the plaintiff, subject to a condition, which recited an agreement by the defendant to sell to the plaintiff 1100*l.* consols, being a sum to which the defendant's wife was entitled on the death of her mother, E. P., and an assignment of the same to the plaintiff by a deed of same date; and also recited that the defendant's wife might survive him and refuse to confirm the assignment; or that the plaintiff might, through defendant's default or otherwise, never realize the benefit of the same; the condition being that, if the defendant should, within six months after the death of E. P., obtain the transfer of the said sum of consols, or if the trustees thereof should, within six months after the death of E. P., transfer the same to the plaintiff, his executors, administrators or assigns, the bond should be void.—The defendant became bankrupt under the Bankrupt Acts of 1849 and 1861, and before the expiration of six months after the death of E. P., he obtained his discharge. In an action on the bond commenced after the defendant obtained his discharge:—*Held*, that the defendant was not discharged from his liability on the bond. Kent *v.* Thomas - - - - 312

PROVINCE OF JUDGE - - - 89
See Ratification of Forgery.

PROVINCE OF JURY - - - 89
See Ratification of Forgery.

RAILWAY COMPANY—Negligence **Ex. Ch. 123**
See Evidence of Negligence.

RATE OR DUTY—Income-tax **78, Ex. Ch. 308**
See Income-tax.

RATIFICATION—Forgery - - - 89
See Ratification of Forgery.

—— Payment by stranger - - - 124
See Discharge of Debtor

RATIFICATION OF FORGERY—*Forged Signature to Promissory Note—Ratifying a Forgery—Construction of Written Document—Province of Judge and Jury.*] The defendant's name was forged, by one Richard Jones, to a joint and several promissory note for 20*l.*, dated the 7th of November, 1869, and purporting to be made in favour of the plaintiff, by the defendant and Jones. While the note was current the defendant signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority:—"I hold myself responsible for a bill dated the 7th of November, 1869, for 20*l.*, bearing my signature and Richard Jones' in favour of Mr. Brook [the plaintiff]." At the trial of an action against the defendant on the note, the judge ruled that this memorandum was a ratification, and directed the jury that the only question for them was, whether the defendant signed it. It being admitted that he did, a verdict was entered for the plaintiff:—*Held* (per Kelly, C.B., Channell and Pigott, BB., Martin, B., dissenting), a misdirection:—Per Kelly, C.B., Channell and Pigott, BB., that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void and incapable of ratification; but that it was, in fact, an agreement by the defendant to treat the note as his own in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on an illegal consideration.—*Semble*, that the memorandum being ambiguous in its terms, it should have been left to the jury to say what its real meaning was when looked at in connection with the circumstances under which it was signed. Brook *v.* Hook - - 89

REASONABLE AND PROBABLE CAUSE—Appeal - - - - - - 87
See County Court Appeal.

REFERENCE TO ARBITRATION—Costs 200, 213
See Costs under County Court Acts. [1, 2.

REPAIR, COVENANT TO - - - - 25
See Covenant to Repair.

REVERTING OF PROPERTY TO BANKRUPT - - - - - 279
See Annulling Bankruptcy.

RIGHT OF ACTION—Collection of water 217
See Collection of Water.

RULE IN SHELLEY'S CASE—*Will—Heirs "and Assigns"—Persona Designata—Ultimate Limitations—Child "born or to be born."*] A testator, by a settlement made on the marriage of his daughter, covenanted with trustees to leave an equal child's share of certain freehold property to the use of her husband for his life or until insolvency, with remainder to her use for life, remainder to the use of the issue of the marriage, with specified limitations; and if there should be no issue, or there being issue all should die under twenty-one years of age, then to the use of her heirs "as if she had died sole and unmarried." His will recited the settlement, and the limitations contained in the will substantially coincided with those contained in the settlement. The ultimate limitation was as follows:—"And in case every child born or to be born shall die under the age of twenty-one years, and without leaving issue, then to the use of the heirs *and assigns* of E. A. V. (the daughter) as if she had continued sole and unmarried," with remainder to the testator's right heirs. There were three children born of the marriage. Two died in infancy, and previous to the date of the will; one was alive at that time, and lived until the age of twenty-three. He predeceased the testator, who died in 1849. The husband of E. A. V. became insolvent in the following year. E. A. V. died in 1868. In ejectment by the plaintiff, who filled the double character of heir-at-law of the testator and of E. A. V., against the defendant, an "assign" of E. A. V.:—*Held*, first, that the ultimate limitation never took effect, and that the plaintiff was entitled to recover as heir of the testator; and secondly, that, assuming it to have taken effect, the plaintiff being the heir of E. A. V., as if she had remained sole and unmarried, was entitled to recover as persona designata.—*Quested* v. *Michell* (24 L. J. (Ch.) 722), commented upon. Brookman *v.* Smith - 291

RULE TO AMEND CASE—County court appeal - - - - - 87
See County Court Appeal.

SALE OF LEASE—Defect of title—Measure of damage - - - - - 59
See Defect of Title.

SALE OF SHARES - - - Ex. Ch. 132
See Custom of Stock Exchange. 2.

SALE UNDER FI. FA.—Bankruptcy—Priority - - - - - 228
See Seizure under Fi. Fa. 2.

SEIZURE—Fi. fa. - - - - 203
See Seizure under Fi. Fa. 1.

SEIZURE AND SALE—Fi. fa.—Bankruptcy—Priority - - - - - 228
See Seizure under Fi. Fa. 2.

SEIZURE UNDER FI. FA.—*Sheriff—Seizure—"Actual Seizure"—Bill of Sale bonâ fide and for Valuable Consideration—Notice of Writ having been delivered to the Sheriff to be executed—19 & 20 Vict. c. 97, s. 1.*] An execution-debtor was possessed of a mansion-house and grounds, and also of a farm, which, with the exception of two outlying fields, adjoined the grounds and formed part of one block with them. The farm was in the debtor's occupation, although the accounts were kept distinct. The farmhouse was a mile distant from the mansion-house in a direct line. On the 19th of May, a writ of fi. fa. was executed at the mansion-house by the under-sheriff, who informed the persons in charge there, including the steward of the estate, that all the goods on the estate were seized; and a man was left in possession. No act of seizure was done at the farmhouse or upon the farm on that day, the under-sheriff intending what he had done to be a seizure of the whole; but on the following day a man was put in possession at the farmhouse. The goods on the farm were claimed by assignees under a bill of sale, made for an antecedent debt, and for the purpose of giving it a preference over the execution, and which was executed on the evening of the 19th after the seizure at the mansion-house was completed. At the time of the execution of the bill of sale, it was known to the solicitor of the assignees that the judgment creditor had threatened to seize, and that a writ of fi. fa. on the same judgment had been executed in another county; and it was expected by him, but not known, that a writ had been delivered to the sheriff of the county in which the goods lay:—*Held*, that what was done on the 19th of May amounted to an "actual seizure" of the goods on the farm and at the farmhouse, within the meaning of 19 & 20 Vict. c. 97, s. 1.—*Semble*, that the bill of sale was bonâ fide and for a valuable consideration within the same section.—By Bramwell, B., that there was no notice to the assignees of the bill of sale that the writ in question had been delivered to the sheriff to be executed within the proviso in the same section.—*Quære*, whether notice of the writ issued in another county was notice within the meaning of the proviso. Gladstone *v.* Padwick - - - - 203

2. —— *Bankruptcy Act, 1869—Execution—Seizure and Sale—Seizure before Act of Bankruptcy—Sale after Adjudication.*] An execution creditor, for a sum less than 50*l.*, who has seized the goods of a bankrupt before the committing of any act of bankruptcy is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale.—*Ex parte Veness* (Law Rep. 10 Eq. 419) discussed. Slater *v.* Pinder - - - - - - 228

SET-OFF—*Company—Winding-up under Supervision—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 87, 101, 130, 131.*] Where a limited company, being insolvent, passes a resolution to wind up voluntarily, and an order is afterwards made to continue the winding-up under the supervision of the Court, in an action afterwards brought by the liquidator in the name of the company against a

SET-OFF—*continued.*
member, a debt due from the company to the defendant previous to the resolution cannot be set off against a debt incurred by the defendant to the company after the resolution. Sankey Brook Coal Company *v.* Marsh - - - 185

—— Bankruptcy - - - - 279
See Annulling Bankruptcy.

SHARES—Allotment - - - - 108
See Letter of Allotment.

—— Sale of—Default of broker - - 255
See Custom of Stock Exchange.

—— Sale of—Stock Exchange - Ex. Ch. 132
See Custom of Stock Exchange.

—— Transfer—Stamps - - - 101
See Stamps. 2.

SHELLEY'S CASE—Rule in—Will - - 291
See Rule in Shelley's Case.

SHERIFF—Fi. fa.—Seizure - - - 203
See Seizure under Fi. Fa. 1.

SHIP—Agent—Commission - - - 9
See Commission "inwards and outwards."

—— Charterparty—Cargo - - Ex. Ch. 53
See Full and complete Cargo.

—— —— Freight - - 20, Ex. Ch. 319
See Payment on account of Freight.

STAMPS—*Exemption from Duty—Benefit Building Society—Drafts by Members on Society—10 Geo.* 4, *c.* 56, *s.* 37—6 *&* 7 *Wm.* 4, *c.* 32, *s.* 4.] By the rules of a benefit building society, its members were holders either of completed shares of 30*l.*, or of uncompleted shares of 30*l.*, to be paid up by monthly instalments. A notice of twenty-eight days was to be given by any member wishing to withdraw his shares, who was, at the same time, to leave his pass-book at the office; and if at any time the money in hand was not sufficient to pay all the members wishing to withdraw, they were to be paid in rotation according to the priority of their notices. By the practice of the society, members holding completed shares were allowed to withdraw only whole shares, but members holding uncompleted shares were allowed to withdraw the whole or any part of the money standing to the account of the shares. Interest was paid half-yearly on completed shares, but not on uncompleted shares. The mode of withdrawing shares, whether completed or uncompleted, was by the member giving notice of withdrawal, upon which he was furnished with a form of request for a draft, on the receipt of which request, signed by him, a draft for the amount was forwarded to him, made payable *to bearer.* The drafts were usually paid within a week of the notice to withdraw. Drafts payable *to bearer* were forwarded half-yearly to the holders of completed shares, in respect of the interest due on the shares, without any previous request:—*Held,* that such drafts were liable to stamp duty, not being within the protection of 6 & 7 Wm. 4, c. 32, s. 4, and 10 Geo. 4, c. 56, s. 37. Attorney-General *v.* Gilpin 193

2. —— *Transfer of Shares—Partition of Shares—55 Geo.* 3, *c.* 184, *Sched. tit. Transfer.*] Four residuary legatees, of whom two were executors, by a deed, made in pursuance of an arrangement for specifically dividing among them certain parts of the testator's personal estate, transferred and released to one another shares in nine companies forming part of the residuary estate, so as to vest in each of the four a portion of the shares in each of the companies, and in one of them all the shares in the ninth company:—*Held,* that the deed required only four transfer stamps under 55 Geo. 3, c. 184, Sched. tit. Transfer. Freeman *v.* Commissioners of Inland Revenue - - 101

STATUTES.
13 Geo. 3, c. 34 - - 78, Ex. Ch. 308
See Income-tax.

36 Geo. 3, c. 52, s. 19 - - - 286
See Legacy Duty.

55 Geo. 3, c. 184, Sched. tit. "Transfer" 101
See Stamps.

4 Geo. 4, c. 36. s. 57 - - - 193
See Stamps.

6 Geo. 4, c. clxxix. - - 78, Ex. Ch. 308
See Income-tax.

3 & 4 Wm. 4, c. 27, s. 16 - - - 129
See Disability.

6 & 7 Wm. 4, c. 32, s. 4 - - - 193
See Stamps.

5 & 6 Vict. c. 35, Sched. (A.), (D.) - 78,
See Income-tax. [Ex. Ch. 308

12 & 13 Vict c. 106, ss. 177, 178 - - 312
See Proof for Contingent Liability.

15 & 16 Vict. c. 76, s. 18 - - - 46
See Cause of Action.

—— —— s. 226 - - - - 4
See Order of Admiralty Court.

17 & 18 Vict. c. 36, ss. 1, 7 - - 1
See Apparent Possession.

—— —— c. 104, s. 514 - - - 4
See Order of Admiralty Court.

—— —— c. 125, s. 3 - - - 224
See Matter of "Mere Account."

19 & 20 Vict. c. 97, s. 1 - - - 203
See Seizure under Fi. Fa. 1.

24 Vict. c. 10, s. 13 - - - 4
See Order of Admiralty Court.

25 & 26 Vict. c. 89, ss. 87, 101, 130, 131 185
See Set-off.

30 & 31 Vict. c. 142, s. 10 - - - 35
See Costs of Case sent to County Court.

—— —— Vict. c. 142, s. 5 - - 200
See Costs under County Court Acts. [1, 2.

—— —— Vict. c. 142, s. 31 - - 15
See County Court Jurisdiction.

32 & 33 Vict. c. 71, s. 6, subs. 17 - 329
See Maliciously procuring Adjudication.

32 & 33 Vict. c. 71, ss. 39, 81 - - 279
See Annulling Bankruptcy.

STATUTORY DUTY—*Water Company—Waterworks Clauses Act,* 1847, *s.* 42—*Liability for not keeping Pipes charged with Water at the Statutory*

STATUTORY DUTY—*continued.*

Pressure.] By s. 42 of the Waterworks Clauses Act, 1847, the undertakers are to keep their pipes to which fire-plugs are fixed, constantly charged with water at a certain pressure, and are to allow all persons at all times to use the same for extinguishing fire without compensation. By s. 43, a penalty of 10*l.*, recoverable by a common informer, is imposed on the undertakers for the neglect of (amongst others) this duty.—On demurrer to a declaration, by which the plaintiff claimed damages against the defendants (a water company) for not keeping their pipes charged as required by s. 42, whereby his premises were burnt down:—*Held*, (following *Couch* v. *Steel* (3 E. & B. 402; 23 L. J. (Q.B.), 121),) that the declaration was good. Atkinson *v.* Newcastle and Gateshead Waterworks Company - - - 404

STAYING PROCEEDINGS—Interpleader - 15
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